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Edited by

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THE LATE Dr. C. P. RAMASWAMI AIYAR.

A star of the most wonderful effulgence has disappeared from our midst. Full of years and honours, Dr. C. P. Ramaswami Aiyar has passed away having been a live force till the last moment of his life. The most venerated and popular of the elder statesmen who had built up an enormous reputation in many walks of life is no more. No man had lived so rich, active and varied a life as his and filled it with so much achievement and distinction in several fields. His career constitutes a rare example of a full and forceful life made possible by a unique combination of natural gifts and personal attainments wherein adventitious luck had not much place.

Dr. C. P. was born with more than the proverbial silver spoon in his mouth. A handsome presence with piercing eyes foretold the greatness and glory that was to be his. It was as if a fairy had whispered into his ears:

"Go on my boy, go on

For the Gods danced at thy birth".

While the first half of his life was one of achievement and spectacular success the second half was one of sublimation and fulfilment. A brilliant academic career was followed by phenomenal success at the Bar even at an early age. Honours and successes came to him thick and fast. His brilliant tenure as Advocate-General, his disinclination to accept a Judgeship of the High Court, his being engaged by the Indian Princes to present their case before the Butler Committee are well-known.

His tenure as a member of the Executive Council of the Governor of Madras revealed him as an administrator of the highest calibre endowed with great vision, integrity and ability. The Mettur Project and the Pykara Scheme for generation and supply of Hydel power for Madras State are a standing monument to his great foresight and awareness of future requirements. It was not so much the glamour of high office as the opportunities it afforded for influencing trends that attracted him to it. His subsequent stewardship as Dewan of the Travancore State was characterised by the same vigour and desire to modernise the State and transform its economy. The famous Temple Entry Proclamation promulgated on his advice and the nationalisation of State transport are eloquent testimony to his imaginative approach to the State's problems. His membership of the Viceroy's Executive Council, though for short periods only, again brought to the fore his administrative talents. He was probably one of the very few Indians to be awarded the dignities of K.C.I.E. and K.C.S.I. during the British regime. Edwin Montagu, the then Secretary of State for India, recorded in his diary that "C.P." was one of the cleverest men he had met in his lifetime.

Dr. Ramaswami Aiyar was naturally influenced by his aristocratic birth, association and convictions in regard to his approach to politics. Pseudo-democratic ideas never appealed to him though he had interested himself actively in the Home Rule and other movements. In fact during the last three decades of his life in spite of his colourful politics, he was in the public eye essentially as a profound scholar, an eminent educationist, and a vivid exponent of a life of culture and philosophy.

Dr. Ramaswami Aiyar had been associated long with education. He had served on the Senate and the Syndicate and had been Vice-Chancellor of more than one University and more than once. He was widely read in English, French

and Sanskrit and was exceedingly well informed on every subject and could therefore play a great role as a cultural ambassador in foreign countries, typical of the best in ancient and hoary Indian traditions and culture. He was not only a voracious reader but also a prolific writer. His Biography of Dr. Besant, Pen Portraits—Essays and Addresses, Phases of Religion and Culture are some of his writings.

Dr. Ramaswami Aiyar had a great sense of humanity. He contributed munificently to several causes and to educational and social institutions. It was his contribution that made possible the starting of a Benevolent Fund for Lawyers in Madras. He did not aim to be spectacular by giving all his donation to a single cause but believed in distributing the same among a number of objects.

Though in politics he was separated from the Ruling Party the Government did not hesitate to avail of his services as Chairman of the Press Inquiry Committee and of the Committee on the administration of Hindu Religious Endowments.

Dr. Ramaswami Aiyar leaves behind him three talented sons the eldest of whom is Sri C. R. Pattabhiraman, Minister of State in the Ministry of Law Government of India, who till his acceptance of office in the Central Government was a well known and highly popular member of the Madras Bar. It is a unique case of greatness running for four generations and should have been highly gratifying to Dr. Ramaswami Aiyar.

Dr. Ramaswami Aiyar was unique among the public men of our country. He was a perfect synthesis of all that was best in the East and the West. A man of great versatility and erudition, a forceful and attractive speaker, a brilliant raconteur, a fine scholar and great advocate, he reached the top in whatever he undertook. His passing away creates a void in our public life which cannot be easily filled.

MATRIMONIAL CEREMONIES AMONG HINDUS

By

KAILASH CHANDRA SRIVASTAVA.*

Bhaurao S. Lokhande v. State of Maharashtra†

Marriage among Hindus was thought to be purely a religious Act¹. Essentially its purpose had been to secure religious ends though social, economical and biological ends were never found absent². The purpose of marriage has been subject to the varying needs of individual, group, family or community at different times and depended mainly upon ethico socio-economical facts of society³. Hindu marriage was never treated to be a relation primarily constituted for attaining physical satisfaction, howsoever dominant motive that had been in many cases. It was also true of western societies with few exceptions.

Robert H. Lowie⁴ observes that, ".....marriage denotes those unequivocally sanctioned unions which persist beyond sensual satisfaction and thus come to underlie family life." It is his view and probably shared by many⁵ that sexual satisfaction can often be amply gratified outside wedlock.

From earliest period to this day, a Hindu marriage has been treated to be a sacrament⁶, though an impression is at times inadvertently caused under the Hindu Marriage Act, 1955, that it is not so. To the Hindu, the importance of marriage was heightened by the sanctions of religion. "By no people," says Sri T. Strange⁷, "is great importance attached to marriage than by the Hindus."

*B.Sc., LL. M., Lecturer in Law, University of Lucknow, Lucknow.

†A.I.R. 1965 S.C. 1564.

1. *Purshotam v. Purshotam*, (1897) I.L.R. 21 Bom. 23 ; Golab Chandra Sarkar Sastri observes in his book on "Hindu Law" 6th Ed., at p. 116 that, "According to the Hindu Shastras it is more a religious than a secular institution." In *H.B. Singh v. T.N.H. Ongbi*, A.I.R. 1959 Manipur 20, it has also been viewed to be a social institution. Also see *Sastri, G.C.*, "Hindu Law", pp. 120 and 121 ; *Munshi v. Bhagwan*, 64 I.C. 350 ; *Tekait Man Mohun v. Basant Kumar*, (1901) I.L.R. 28 Cal. 751 ; *Atmaram v. Bankumal*, (1930) 11 Lah. 598 ; *Sunderbai v. Shivnarjan*, (1908) 11 Lah. 598 ; Bancrjee's Law of Marriage and Sridhan, 4th ed., p. 29 ; Mayne's Hindu Law and Usage, 11th Ed. p. 101. In *Meghnada v. Susheela*, A.I.R. 1957 Mad. 423, 426, Ramaswami, J., observed that "Marriage is the very foundation of civil society....."

2. "The core of marriage among Indian is certainly not sexual intercourse", Prof. S. S. Nigam in Journal of Indian Law Institute, (1963) Vol. 5, No. 1, "Marriage and Stridhan" by Bancrjee ; See the article on "Marriage" in Encyclopaedia of Social Sciences, Vols. IX and X. Also see Mayne's Hindu Law and Usage at p. 101, "From the very commencement of the Rigvedic age, marriage was a well-established institution and the Aryan idea of marriage was very high."

3. Report of Hindu Law Committee, p. 8 ".....changes have been made in the Hindu Law by the authors of the dharmashastras from time to time....." and "Marriage" in Encyclopaedia of Social Sciences, Vols. IX and X.

4. Encyclopaedia of Social Sciences, Vols. IX and X (Marriage).

5. Golab Chand Sarkar Sastri's "Hindu Law" at pp. 120 & 121 ; Prof. S. S. Nigam in "A plea for uniform law of divorce," *ibid*.

6. *Purshotam v. Purshotam* (1897) I.L.R. 21 Bom. 23 ; Report of Hindu Law Committee and *Gopal Krishna v. Venkatanarasa*, (1914) I.L.R. 37 Mad. 273 : 23 M.L.J. 288 (F.B.).

7. Elements of Hindu Law, Vol. I, p. 35.

It was the only sacrament for women and sudras according to the shastras⁸. Hindu Marriage was treated to be a religious necessity. It being a settled doctrine of the Hindu religion that one must have a son of his own, to save him from a place of torment called "Put",⁹, though a substitute¹⁰ was provided by sages at a later period.

"Even in those early days, the Hindus learned to regard marriage as a true companionship of the purest character, a union of pure hearts, for the cultivation of best feelings of our nature"¹¹. In Vedic period the sacredness of matrimony was repeatedly declared and the holy union once constituted was deemed to be indissoluble¹². The above religious belief of past has become a matter of bygone days, and has suffered shattering disturbance at the hands of the Hindu Marriage Act, 1955, which seemingly confers equal freedom on male as well as female in deciding their own purely personal and domestic affairs¹³. The jointness in thought, action and living has suffered revealing changes and modified to a large extent. And as the freedom given to individuals by statute and liberally conferred on them by the courts increases, the power of family or group to decide and control their fate and fortune diminishes. This is the contribution of the welfare society and the democratic set up. The Constitution of India secures much liberty of an individual with unit. But this still remains a perplexing question, whether the individual needed this much of freedom in managing his or her own domestic affairs, devoid of secular and parental considerations. The individual is free to release himself or herself from the matrimonial bonds, where he or she fails to maintain conjugal happiness. But the trivial consideration or mere misadjustments will not be permitted to become the source of ruinous litigation and cause for family disorder. The Act makes one realise that he should be mentally and physically prepared to preserve the sanctity of the marriage institution and its spirit should not decay or be washed away by unfair consideration¹⁴. Impliedly the liberty so given by the statute seems to be a restrained

8 *Kameshwara Sastry v Veerachari*, (1911) 34 Mad 422, Manu Chapters II, 67 and Manu Chapter IX, 138

9 Manu Chapter IX, 138

10 An adoption of a son was permitted to meet the religious necessity, see *Amarendra Man Singh v Saratan Singh*, L.R. 60 I A 242 (1933) 65 M.L.J. 203, *Gurunath v Kamalbat*, A.I.R. 1955 S.C. 206 1955 S.C.J. 178 (1955) 1 M.L.J. (S.C.) 9, also see "Annual Survey—Hindu Law" by Prof S S Nigam in the Journal of Indian Law Institute, Vol 6, No 4, at p 547

11 'Hindu Law of Marriage and Stridhan' by Banerjee at p 30

12 Manu Chapter VIII, p 227, *Administrator v Ananda* I.L.R. 9 Mad 477, *Bhagat v Shanti* 50 I C 654, *Munshi v Bhagwan*, 64 I C 316, *Sankaralingam v Subba*, (1890) I.L.R. 17 Mad 479, *Sunderbat v Shunaram* (1908) 32 Bom 81, though customary divorce were permitted in a few States *Kaseeram v Umabaram*, Baroda 387, *Kudmee v Joleeram*, 3 Cal 300, *Hua v Hansi* 64 Bom L.R. 1182, *Jangalia v Jhangaya*, 63 I C 594

13 *H B Singh v T N H O B Das* A.I.R. 1959 Manipur, 20, *Kausathya v Wishakhnari*, A.I.R. 1961 Punj 521, Report on Hindu Law Committee, see an interesting decision of Jammu and Kashmir H.C. *Jogendra Kaur v Shu Charan*, A.I.R. 1965 J & K 90 and *Smt Tirath Kaur v Kripal Singh* A.I.R. 1965 Punj 28 and its implication on the Hindu joint family. It is the view of Prof S S Nigam that The Hindu Marriage Act, 1955, is based upon the English Matrimonial Practice and Precedents

14 See *Gurdeva v Sarwan Singh*, A.I.R. 1959 Punj 162, *A Kuppuswami v Alogammal*, A.I.R. 1961 Mad 391, *Sayal v Sarla*, A.I.R. 1961 Punj 25, *Laxman v Aiena*, A.I.R. 1961 S.C. 40, see Derrett's "Modern Hindu Law", p 140, *Bhagwanti v Sadharam*, A.I.R. 1961 Punj 18 (It reflects the attitude of the Courts)

liberty and the Court is made the guardian¹⁶ to see that the same spirit is maintained even in apparently hard cases. Though, in practice it is observed that the duty statutorily put on the Court is more respected in its non-observance.¹⁶

Ceremonies and their legal significance.—Before a man or woman can secure the status of husband or wife, it is essential that some proper ceremony religious or statutory or customary should be performed in order to celebrate the marriage of the parties.¹⁷ The proper ceremonies must be of recognised form and should be observed fully and completely. Their observance, it has decidedly¹⁸ been observed, is a *must* and the non-observance may carry far-reaching effects on the lives of parties to that marriage or on their issues etc.

Ceremonies necessary in all forms of marriage.—A Hindu was allowed to secure his bride in many ways¹⁹, but in all forms of marriage, ceremonies of some sort were essential²⁰. McNaughten²¹ was of the opinion that, the Gandharva was the one of eight modes, in which no ceremony was required since in that there was no gift of the bride, but the union between man and woman was brought on ground of mutual desire and sensual inclination.²² But it is a judicially accepted view the observance of some sort of religious ceremony was not only necessary but essential in Gandharva marriage too, unless it was excluded by a recognized custom²³.

A Hindu marriage must be solemnized.—Section 7, Hindu Marriage Act, 1955, prescribed that a Hindu marriage should be “solemnized” or “celebrated with proper ceremonies and in due form”. It follows, therefore, that unless the marriage takes place with proper ceremonies and in due form, it cannot be said to be a marriage in

15. See section 23, Clause (2), Hindu Marriage Act, 1955.

16. Prof. S. S. Nigam in Annual Survey—“Hindu Law”, in the journal of Indian Law Institute Vol. 6, No. 4 at p. 553.

17. Section 7, Hindu Marriage Act, 1955—But the word ‘may’ has been used in section 7, of the Hindu Marriage Act, 1955.

In *Kutta Devi v. Shri Ram*, A.I.R. 1963 Punj. 235, it was held that where a marriage is alleged to have been performed according to Vedic rites, it is essential to prove “Panigrahana” and “Saptapadi”; see also *Bhaurao v. State of Maharashtra*, A.I.R. 1965 S.C. 1564 and *Phankari v. State*, A.I.R. 1965 J. & K. 107.

18. *Phankari v. State*, supra *Bhaurao v. State of Maharashtra*, supra *Deviani v. Ghidambaram*, (1955) 2 M.L.J. 173 : A.I.R. 1954 Mad. 657 ; Banerjee’s Law of “Hindu Marriage and Stridhan” at p. 20 ; Sircar’s Vyavahara Darpana, 2nd Ed., p. 650 ; Strange’s Hindu Law, Vol. I, p. 42, H. T. Colchrooe Essay III, Asiatic Researches, Vol. VIII, p. 288 see also Digest of Customary Law 8th Ed. by W. H. Rattington.

19. In ancient period, a Hindu bride was secured in eight modes viz., Brahma, Arsha, Daiva and Prajapatya (approved forms) ; Gandharva, Asura, Paisachya and Rakshasa (unapproved forms) Now only three forms have survived viz., Brahma, Asura and Gandharva and the presumption is that all marriages are celebrated in Brahma form unless the contrary is proved. See *Veerappa Chettiar v. Michael*, A.I.R. 1963 S.C. 933.

20. Mayne’s Hindu Law and Usage, 10th Ed., pp. 129, 130, 134 to 136.

21. Principles of Hindu Law, 3rd Ed., p. 81.

22. Mulla’s Hindu Law, 12th Ed., p. 605; *Bhaurao v. State of Maharashtra*, A.I.R. 1965 S.C. 1564

23. *Bhaurao v. State of Maharashtra* supra.

the eyes of a law²⁴ It is further to be noted that the ceremonies gone through must be of recognized form and must have acquired the force of law by their long continuance and uniformity in the family group, community or tribe or in the particular locality in question to which the parties belong²⁵ Section 7 of the Hindu Marriage Act, 1955 states as follows —

Clause (1) A Hindu marriage may be solemnised in accordance with the customary rites and ceremonies of either party thereto

Clause (2) "Where such rites and ceremonies include *Saptapadi* (that is the taking of seven steps by the bridegroom and the bride jointly before the sacred fire), the marriage becomes complete and binding when the seventh step is taken"

Thus Section 7, clause (1) of the above Act requires that the Hindu marriage should take place with proper ceremonies of either party thereto The option to marry in accordance with the ceremonies of either party seems to provide a convenient and adjustive mode to bring intercaste and mixed marriages in full force and vigorous operation² This provision thus contains the most reformatory and progressive views and secures marriages of any Hindu with the other Hindu (according to the Act) irrespective of his or her religious beliefs and affiliation to a particular sect or caste But it is yet to be seen how far this spirit of the Legislature receives practical encouragement and acceptance It has been observed that the Hindus (howsoever western minded they have become in the present society) still hesitate to take such a bold and revolutionary step and cross the barrier of caste sect and marry or give their wards in marriage The hope

24 *Bhaurao v State of Maharashtra*—A.I.R. 1965 S.C. 1564 *Phankari v State*—A.I.R. 1963 J. & K. 107 But the ceremonies were not treated to be essential in cases of marriage of non virgins—*Ram Rani v Doulat* 96 I.C. 1056 *Janki v Queen Empress* 19 Cal 627 *Nra v Rudra* 1 I.L.R. 8 Mad 440 It is the view of Sarkar that secular ceremonies were more emphasized in Gandharva form than religious ceremonies viz *Saptapadi*—see at p. 158 of Sarkar's Hindu Law But a marriage established in fact was to be according to law unless the contrary was proved—*Inderan v Ramaswamy* 13 M.I.A. 141

Then if there was a marriage in fact there was a marriage in law when once you get to this viz that that there was a marriage in fact there would be a presumption in favour of there being a marriage in law *Fakir Gouda v Gangi* (1898) 22 Bom. 277 279 *Ramamani v Kulandai* (1871) 14 M.I.A. 346 365 366 *Barappa v Khimji* (1938) 60 Bom. 455 And a presumption was also drawn that the necessary ceremonies had been performed—*Mouji Lal v Chandabai* (1911) 38 I.A. 122 21 M.L.J. 933 *Bhulabhai v Chundoo* (1886) 12 Cal. 340 *Har Datt v Moti* (1888) 22 Bom. 559 *A. C. v Anandachari* (1886) 9 Mad. 466 The strongest presumption used to arise in favour of marriage when a man and woman were recognised as husband and wife by all persons concerned and were so described in important documents and on important occasions—*Mouji Lal v Chandabai*—supra *Chellammal v Ramnathan* 12 I.C. 247 see 50 Indian Evidence Act *Biju v Atul Krishna* 17 C.W.N. 494 see also *Phankari v State*—A.I.R. 1963 J. & K. 107 which gives a contrary view in an alleged bigamous marriage

25 *Bhaurao v State of Maharashtra*—supra But a presumption was drawn that all marriages were solemnized in Brahma form—*Venappa Chetti or v Michael*—A.I.R. 1963 S.C. 933 *Moghi v Ladu* 13 I.C. 644 and in an approved form—*Thakur Deyhee v Rai Baku* 11 M.I.A. 139 *Jagganath v Rani* 12 Cal. 354 *Jadunath v Basant* 11 Bom. L.R. 286 *Uma v Sarbajit* 85 I.C. 618 *Chandabhai v Vishanath* 20 I.C. 557 *Jagganath v Narayan* 34 Bom. 553 *Kolhapur Maharaja v Sundaram* 48 Mad. 1 But the marriage must be in due form—*Vishwanathswami v Kani* 21 I.C. 724

1 *Chundal v Suraj* 3 I.C. 763 *Ankuravelu v Ramaswamy* (1909) 32 Mad. 512 *Bindaban v Chand* (1886) 12 Cal. 146 *Staba v Vishwanathswami* A.I.R. 1939 Bom. 141— Under the Hindu Law the only requirement of the ceremony called the *Saptapad gaman* is that the seven steps and not seven rounds should be taken round the nuptial fire and that it is on the taking of the seventh step that the bride and the bridegroom become united in the marriage

2 See Report of the Hindu Law Committee

rests upon the younger generation, who may find much encouragement from the Act and may grant a great source of relief to their parents. But still, it is doubted that proper decision and right choice of partner is found existing. The ill-guided hasty steps based on a sentimental or selfish consideration may sometimes destroy the very foundation of their matrimonial relationship. It has been an evident fact. Arranged marriages, even well conceived, are much disliked today but even then they possess a few qualities worth realizing. Clause (2) of section 7 of the above-mentioned Act provides the *moment* as to when a Hindu marriage will be deemed to have been complete and binding, if *Saptapadi* is performed in the ceremony and the marital tie will be created in the eyes of law. The marital tie, which was once treated to be indissoluble, has been made breakable under the provisions of the Act³. The very foundation of the matrimonial bond may suffer serious blow and lead to collapse on account of the non-fulfilment of necessary requisites of a valid Hindu marriage under the Act⁴. It may also be allowed to oscillate or cut off, if one or both the parties to marriage fail to secure conjugal happiness on account of incapacity or incompetency to maintain family peace and mental harmony in domestic affairs⁵. The Act may be a worthy and understanding friend to those who fail to create a reasonably decent and proper equilibrium in the matrimonial environment and find the carrying of joint living a physical impossibility and mental harmony between them absent. But the law and the Court take every caution to see that the parties receive the benefits of the Act honestly⁶. It is the feeling of many scholars⁷, that Hindu men and women are still to acquire that much of boldness and courage to seize the benefits of the Act, as the westerners are taking of their own personal laws in their countries. The Hindu society still pays a sneering eye on such actions and we are yet to formulate a society, in which such actions will become a part of our life.

The literal scrutiny of section 7, Hindu Marriage Act, 1955 gives no clue as to the nature and form of ceremonies. It is a fact to be gathered from the existing law. Few customary ceremonies have been judicially noticed in this respect⁸. Section 7, Hindu Marriage Act, 1955 gives only two things, *viz.*, (1) that the Hindu marriage, essentially being a *Sanskara* (not expressly mentioned anywhere in Act), it must be

3. See sections 9 to 13, Hindu Marriage Act, 1955.

4. See section 5 Hindu Marriage Act, 1955.

5. See section 10 and 13 Hindu Marriage Act, 1955.

6. See section 23 Clause (1) and Clause (2) Hindu Marriage Act, 1955.

7. See Derrict's "Introduction to Modern Hindu Law", Raghavachariar's Hindu Law.

8. In addition to the forms of marriage, there are certain forms of marriage practiced by persons in various parts of India, which are sanctioned by custom and have no religious significance, *viz.* (i) *Dang* marriage (*Santala v. Badasuri*, 1924 Cal. 98) (ii) *Santigranta* marriage—(celebrated among *Tippurah* castes), (iii) *Sarvaswadharm*—(practiced among *rombrdaris*; *Vasudevan v. Secretary of State*, I.L.R. 11 Mad. 157); (iv) *Katar* marriage—(Recognised among *Rajputs* and *Khumbla* *Tottiya* community—*Ramaswami v. Sunderlingasan*, I.L.R. 17 Mad. 1, it was held that they were pure cases of concubinage); (v) *Nadu Veetuthali* (prevalent among the *Nayakara*—*Tirumalai v. Ethurajammal*, 1946 Mad. 466); (vi) *Karao* marriage—(It is a quite valid marriage and practiced among *Ahirs*—*Kaura Devi v. Indra Devi*, A.I.R. 1934 All. 310; *Kishan Devi v. Sheo Pattan*, A.I.R. 1926 All. 1, and (vii) *Kantibadal*—(practiced among *Jati Vaishnads*; The marriage in such form is treated to be complete by mere exchange of garlands—*Benod Bihari v. Shashibhusan*, 1939 Cal. 460.

The customary ceremonies vary according to the local or family usage. See *Asiatic Researches*, Vol. VII, p. 288; *Digest of Customary Law* by Rattington, VIIth Ed. and it was laid down in *Deviani v. Ghidambaram*, that the Courts are bound to recognize them.

celebrated with proper ceremonies and in due form; (2) the moment or the time when the marriage will be deemed to have been complete and binding where *Saptapadi* constitutes a part of that ceremony. Section 7, Hindu Marriage Act, 1955, stresses upon the observance of the ceremonies for celebrating the marriage. If the marriage is not celebrated with proper ceremonies and in due form, it will not be said to have been "solemnized".

The Supreme Court of India in *Bhaurao v. State of Maharashtra*⁹, observed that a Hindu marriage must be "solemnized". It will be said to have been solemnized only when it is celebrated in accordance with proper or recognized ceremonies and in due form.

Thus, it becomes a question of inquiry and search to determine what ceremonies amount to be proper and recognized in the eyes of law, i.e., either sanctioned by the Shastras (which are still permitted under the New Act) or by any recognized customary ceremonies.

In the ancient period¹⁰—In Brahma form of marriage, marriage ceremonies consisted of *Vridhhi Sradha*, *Sampradana* or gift and *Panigrahana* or the acceptance of the bride's hand. The ceremony used to commence with the kindling of the nuptial fire and various oblations to that, were made including the mahavyah-rite homa. In the course of those oblations, various texts were recited; the bride, then was made to walk seven steps. That was the most essential part of nuptial rites as according to the sages, marriage became complete and irrevocable on the completion of seventh step. The ceremony was popularly known as *Saptapadi*. After its completion other incidental ceremonies generally followed but none were as important as the former. The observance of *Saptapadi* is essential even today and it must be performed to give Hindu marriage binding legal force¹¹. In the opinion of Gooroo Das Banerji, Law of each nation required the observance of forms and solemnities to make a marriage perfect and the intention of parties to the marriage public. It is said that the insistence on the observance of the ceremonies were to let people know that the parties to the marriage entered into matrimony with their free-will and full realization of its sanctity and necessary consequence¹². It may be pointed out that such understanding never required a very high degree of mental capacity as is required in complicated commercial transactions.¹³ It never required express consent of the parties to marriage in arranged marriages¹⁴, which were the common feature of the past age; and still in operation, but with notable modification in old thinking. It is becoming a practice, these days, to take or find out the will of the boy or girl in choosing their life partner. It is generally taken and exceptions to such practice seems to be undesirable in the new approach to Hindu society and its laws. And

9. A.I.R. 1965 S.C. 1564.

10. "Marriage and Sridhan" by Banerjee

11. *Kanta v. Sivan*—supra and section 7, Clause (2) Hindu Marriage Act, 1955.

12. "Marriage and Sridhan" by Banerjee, pp 100-103

13. *Kaura Devi v. Indra Devi*, A.I.R. 1934 All 310, *Durham v. Durham*, (1885) 10 P.D. 80.

14. *Sridhar v. Huralal*, (1887) 12 Bom 480 at p 486, *Khasal Chand v. Bai Mani*, (1886) 11 Bom. 247 at p. 255 (The gift, it is said, was made merely in discharge of the duty of the guardian and not in exercise of any right of property in girl)

probably this was the reason why a statute ¹⁵, was passed to prevent the child marriages in India ; though in practice it has not stopped yet. Section 5, clause (iii) of Hindu Marriage Act, 1955, also contains the same view .

Customary rites :—A Hindu marriage may also be solemnized in accordance with the customary rites of the either party to marriage. The Hindu Marriage Act, 1955, does not abrogate them. They have not been invalidated by the Act. But such customary ceremonies must have been treated as a rule of law and should have received judicial recognition¹⁶. The customary rites may be prescribed for a group, family, community, tribe or a particular locality. It is submitted with great helplessness that the comprehensive study of numerous forms of customary rites is physically impossible due to the vast area of the country and the existence of many tribes, families, groups and communities therein. It is not untraceable than untraced by the jurists. The Hindu Marriage Act, 1955, is not of any help in this respect. It does not enumerate any list of such rites. Some illustrations are available in few-books.¹⁷ The customary rites in order to be legally effective must fulfil the following requisites¹⁸ :—

The rule of law or usage must have ;

(i) continuous and uniform observance ;

(ii) for a long time, and

(iii) thus obtain the force of law among Hindus. The customary rites must be treated to be a part of their law of marriage and its observance must be consistent, continuous, uniform and for a long time. Further such custom must not be unreasonable, immoral¹⁹ or opposed to public policy. The Hindu Marriage Act, 1955, does not require that such custom should be ancient²⁰. It is sufficient, if it has been observed for such a long time, as to clothe it with legal force and it has become part of their law of marriage. How much length of time will be sufficient to convert the usage into customary law will be the task of the Court to determine in each individual case.²¹ Thus no standard formula can be given as to what length of usage in point of time will be sufficient to give the usage legal recognition in a particular case. Mere observance for few years or relaxation of essential requirements in few cases will not give it a legal recognition, whether that is objected or unobjected on previous occasions²².

15. The Child Marriage Restraint Act, 1929.

16. It is implied from the decision of *Bhaurao's case*, A.I.R. 1965 S.C. 1564.

17. Hindu law by Raghavachariar ; Hindu Law by Golap Ch. Sarkar Sastri, Hindu Law of Marriage by S. V. Gupte ; Principles of Hindu Law by Mulla ; Hindu Family Law by Trevelyan ; Digest of Customary Law by Rattington 7th Ed. H.T. Colebrooke Essay III and Asiatic Researches Vol. VII, p. 288.

18. See section 3, clause (d) Hindu Marriage Act, 1955.

19. *China v. Tagrai*, (1876) I.L.R. 1 Mad. 168 ; *P. Latchamma v. M. Appalaswamy*, (1960) 2 An.W.R. 335 : A.I.R. 1961 A. P. 55 (opposed to the statute).

20. See section 3, clause (a) Hindu Marriage Act, 1955, but under the old law, the custom was required to be ancient see *Har Pd. v. Shiv Dayal*, L.R. 3 I.A. 259.

21. *Gokal v. Parvin*, 1952 S.C.J. 331 : A.I.R. 1952 S.C. 231 and *N. Venkata v. T. Bhujangappa*, (1960) 1 A.W.R. 215 : A.I.R. 1960 A. P. 412.

22. *Bhaurao v. State of Maharashtra*, A.I.R. 1965 S.C. 1564.

The customary rites may include the performance of *Saptapadi*. If that is so, it must take place unless the custom prevalent in the community has abrogated its performance.

In *Bhaurao v. State of Maharashtra*²³, the Supreme Court observed that in customary rite it must be investigated whether *Saptapadi* formed a part of the ceremony or not? If it constituted a part of that ceremony, then it must take place to give the marriage complete and binding force. And if it did not, its non observance would not invalidate the marriage and then it need not be performed.

The facts of the case were that Bhaurao (accused) was charged with the offence of bigamy under section 494 of Indian Penal Code. For proving the charge of bigamy, it was essential for the prosecution to prove that the accused married a second time in the eye of law. The prosecution led the evidence that the marriage was performed in Gandharva form and according to the custom of the community invocation before the sacred fire and the observance of *Saptapadi* was not essential. The marriage was solemnized by exchange of garlands and performance of some puja by putting betel leaves and coconut on the tambya pitcher and then they struck each other's forehead. It was further stated by the witnesses that the presence of a Brahmin priest was not necessary in their custom and the marriage was not required to be celebrated in a temple and there was no custom to blow a pipe called *Bher*. No barber was required to be present at the time of marriage. The only act necessary in their custom was that the father of girl should make the foreheads of the girl and boy touch to each other and the Gandharva form was completed.

The Supreme Court concluded from the evidence of Bhagwan witness No 3 and Jeebhau witness No 4 that it was not proved how the custom modified the essential forms of marriage. It is to be noted that the witness on cross examination stated that for the last 5 or 7 years a Brahmin priest a barber and a thakur were not required to perform Gandharva but formerly it was essential.

It was further observed by the Supreme Court that the statements of the witnesses did not establish that the two essential ceremonies were no more necessary to be performed for a Gandharva marriage.

The Supreme Court also remarked that the mere fact that they were probably not performed in the two Gandharva marriages Jeebhau attended did not establish that their performance was no more necessary according to the custom in the community. Further mere departure from the essential for 5 or 7 years could not be said to have become a custom as contemplated under the Hindu Marriage Act 1955. Section 3 clause (d) Hindu Marriage Act, 1955 required that the usage must have received long continuous and uniform acceptance in the community and attained the force of law.

Thus the Supreme Court has laid down that for a valid Hindu marriage it is essential that it must have been performed (i) with proper ceremonies and (ii) in due form then only it will be said to have been solemnized in accordance with the provisions of section 7, Hindu Marriage Act, 1955. And there are two ceremonies essential to the validity of a marriage viz, (i) Invocation before the sacred fire, and (ii) *Saptapadi* that is

the taking of seven steps by the bridegroom and the bride jointly before the sacred fire. Any customary ceremony which does not require the performance of the above ceremonies, must be strictly proved with definite evidence. Thus, whether a particular customary rite will be a proper ceremony in one case or the other will remain a matter for judicial investigation and interpretation.

The above-mentioned case thus creates distressing situation for the first wife (Smt. Indubai, married in 1956). Neither she can obtain divorce under section 13, clause (2) (i) of the Hindu Marriage Act, 1955, because the charge of bigamy had failed in that case due to the insistence of the Court in requiring strict proof with reference to the solemnisation of the second marriage nor she can get the second marriage declared null and void under sections 11 and 12 of the Hindu Marriage Act, 1955 (if there had been a second marriage in the eye of law) because no such statutory right has been given to her to do so under the above Act.

Thus, if she cannot obtain divorce under section 13, clause (2) (i) of the Hindu Marriage Act, 1955, for the abovesaid reason, she will have to remain in that very house throughout her life in agony and mental pain. She may, however, obtain divorce, if she can successfully prove that her husband is continuously living in adultery²⁴ but this course will be full of cumbrous procedure and will present all those difficulties which are usually inherent in a divorce petition.

The only course open to her in such a case will be to come as complainant and see her husband punished for committing the offence of bigamy and where naturally she will fail because that offence will not be proved.

Such a situation, it may be pointed out, is also not desirable for the second woman (fraudulently married in the mock marriage). Since from the date of marriage she honestly continues to believe herself to be the legally wedded wife but subsequently learns that she does not possess any status, other than of a concubine, which she would not have perhaps accepted, had it been anticipated by her at the time of her marriage with the accused.

Thus, ordinarily, mere exchange of garlands or touching of foreheads by each party to marriage or other or presence of a priest or moving together will raise no presumption as to the existence of any legal matrimonial bond between the parties and decided law²⁵, will confer no status of husband and wife on the parties. It is submitted that even the honest belief of the parties (to such marriage), society or relation that they are husband and wife, "in fact", will be of no help to them in the eye of law.

It is curious to note that nowhere in the Act it is provided that if the marriage is not celebrated in accordance with the provisions of section 7, Hindu Marriage Act, 1955, then the marriage will become invalid. The Act remains silent on this point and thus leaves a serious lacuna in this respect.

It is now clearly stated by the Supreme Court that no marriage will be said to have been legally "solemnized", unless it is celebrated with proper ceremonies.¹

24. *Ghanda v. Mst. Nandu*, A.I.R. 1965 M.P. 268.

25. In bigamous marriages only see A.I.R. 1965 S.C. 1564 and A.I.R. 1965 J. & K. 107.

1. The observation has been made in reference to an alleged bigamous marriage (*Bhaurao's case*, A.I.R. 1965 S.C. 1564).

The judicial interpretation in this respect is seemingly an improvement upon the drawback of the Act

It is also to be noted with uneasy interest that nowhere in the Act, it is expressly provided that the issues of marriages improperly celebrated will be deemed as legitimate. It is something to be implied from the decision of *Bhaurao v State of Maharashtra*². It is believed that section 16, Hindu Marriage Act, 1955 will be of no assistance in that respect, though a presumption has been drawn in a few cases³. Without such presumption, it is evident that the fate and fortunes of parties to few forms of marriage may remain at stake and hang on insecurity of their relationship with each other.

Viewed from the technical point of view, the decision of the Supreme Court in *Bhaurao's case*⁴ rests on a very sound basis but from practical point of view, it becomes helpless to check a great social evil, which incidentally crept from the judicial pronouncement, due to the drawbacks of the Hindu Marriage Act, 1955. It is unfortunate to note that the Hindu Marriage Act, 1955, does not provide any penalizing clause to punish persons contracting "Mock Marriage". Section 496, Indian Penal Code⁵, has not been made applicable to the Hindu Marriage Act 1955 which provides punishment to those who knowingly contract "Mock marriage", as is done in the case of offence of "Bigamy", in section 17 of the above mentioned Act and read with section 494 of Indian Penal Code. If it had been the position the Supreme Court could have taken a further step, viz, to have punished the accused (*Bhaurao*) on the charge of contracting a "Mock marriage" even though he was acquitted on the charge of bigamy (which could not be established in that case since the second marriage was not properly celebrated in the eye of law, though there had been a second marriage "in fact").

The absence of a penalizing clause, punishing persons contracting "Mock marriage", in the Act is thought to be of a very considerable significance in the new and changing welfare society. Since such person will be able to enjoy all the fruits of a "matrimony in fact" and (even) will be let off to be treated as an innocent man

2. A I R. 1965 S C. 1564 and *Mohd Ikram v State of U P*, A I R. 1964 S C 1625

3. *Inderan v Ramaswamy* 13 M I A. 141, *Sitabai v Vishabai Nandoo* A I R. 1959 Bom 141, *Anandi v Onkar*, A I R. 1960 Raj 251, *Parvati Bhat v Natunkant* A I R. 1961 MP 93, *Gokal v Parvati*, A I R. 1925 S C 231

4. A I R. 1965 S C 1564

5. S 496, I P C states as follows —

'Whoever, dishonestly or with a fraudulent intention goes through the ceremony of being married knowing that he is not thereby lawfully married shall be punished'

'The phrase that 'he is not lawfully married' rather points to a form of ceremony which is insufficient to constitute marriage. It does not apply to cases where the form was right. This section (viz, section 496, I P C) rather applies to a case where there is only a show of marriage for some ulterior or fraudulent purpose. It has application rather to a marriage which is left incomplete owing to the omission of a necessary form. See *Dr Hari Singh Gour's Penal Law in India*, 6th Edn., Vol. III at pp 2309-2310

6. Because the accused *Bhaurao* was presumed to know that after 1955 he could not marry a second time in the lifetime of his first wife in the eyes of law. The Hindu Marriage Act, 1955 in section 5 Cl (a) provides the rule of 'monogamy' and the offence of bigamy has been made punishable under section 17 of the above mentioned Act read with sections 494 and 495 of I P C. now See *H B Singh v T N H Ongbi*, A I R. 1959 Manipur 20 and *Charda v Nandu* A I R. 1965 M P 268

in the society. It is a matter of social interest that the Court should not only step in making a distinction between a case of "concubinage" and "bigamous marriage"⁷, but also be empowered under the Hindu Marriage Act, 1955, to deal with the cases of "concubinage" and punish the offender if socio-economical and humanitarian conditions demand it. If it were not so, the hands of the judiciary will be too tied, in liberally conferring relief to innocent parties (to the first wife and the second woman so married in the "mock marriage").

It is submitted that the decision of the Supreme Court may incidentally become a contributor to the continuance of a social evil at the cost of giving protection to the accused in reference to a bigamous marriage, for the purposes of the criminal law and the technical rule of construing penal law (in favour of the accused) and a person contracting a mock marriage or a "marriage in fact" may go unpunished due to one of the lacunae of the Hindu Marriage Act, 1955.

Thus it is reasonably believed that such socially significant situation may cease to exist if a single or a specific ceremony⁸, is prescribed in the Hindu Marriage Act, 1955 to "solemnize" marriage (whether first or second) and an uniform rule is formulated by the Court to prove its validity or invalidity. It is hard to note that the Court is to adopt a dual policy to observe the solemnization of marriage, in marriages celebrated in different forms. In bigamous marriage or an alleged bigamous marriage the Court requires strict proof in proving a second marriage, with definite evidence and judges the sufficiency of ceremonies in the light of the criminal law and its technical rule of interpretation; and in first marriage it draws generally a presumption that a marriage celebrated "in fact" though with insufficient and improper ceremonies or no ceremonies (where a recognised custom does not require the observance of invocation before fire and performance of Saptapadi) is a "marriage in the eye of law". Though the presumption is rebuttable it requires very compelling evidence to so rebut it. The Court, it has been observed have shown their disinclination to set aside the presumption in every case and allow the state of "concubinage" to exist.¹⁰

7. *Phankari v. State*, A.I.R. 1965 J. & K. 107. ✓

8. If a single ceremony is provided, the labour of the Court to determine the sufficiency and the validity of the matrimonial ceremony in a bigamous marriage will also be minimized. It is necessary because there are many forms of marriage ceremonies prevalent in India and in few, ordinary ceremonies complete the marriage viz., in Kantibadal marriage, mere exchange of garlands completes the marriage, though in Bhaurao's case, mere exchange of garland was not treated to be a proper ceremony to solemnize the marriage in the eye of law by the Supreme Court and the invocation before the sacred fire and observance of Saptapadi was held to be an essential part of marriage ceremony, to complete the marriage in his caste).

9. *Bhaurao v. State of Maharashtra*, A.I.R. 1965 S.C. 1564 etc. in footnote 24 at page 38 *supra*.

10. "The law leans in favour of validity of marriage rather than a state of concubinage, once it is proved to have existed *de facto*....." Derrett's "Introduction to Hindu Law" 1963 Ed. at p. 166; *Inderum v. Ramaswamy*, 13 M.I.A. 141; *Sitabai v. Vithabai*, A.I.R. 1959 Bom. 141 quoted by him in support of the above observation. (See *Mohabbat v. Mohamed*, L.R. 56 I.A. 201; 57 M.L.J. 366; A.I.R. 1929 P.C. 135—A continuous cohabitation for a number of years raises a presumption in favour of marriage and against concubinage); also see *Anandi v. Onkar*, A.I.R. 1960 Rag. 251; of course, the presumption is rebuttable—*Gokul v. Parvin*, 1952 S.C.J. 331; *Mawun v. Ma Kin*, (1907) 35 I.A. 41; 18 M.L.J. 3; *Parvin v. Nalini Kant*, A.I.R. 1961 M.P. 93; *Bachibhai v. Bai*, A.I.R. 1961 Guj. 141 & *D. Nagarajamma v. State Bank*, (1961) 1 An.W.R. 65, A.I.R. 1961 A. P. 320.

In the present society, it is observed that the Hindu women are becoming more conscious of their rights and the law is expected to provide them relief in those situations where they have not been provided relief yet; because the marriage institution is becoming, fastly a social than a religious institution too. *H. B. Singh v. T. N. H. Ongbi*, A.I.R. 1959 Manipur 20.

CHANGING CONCEPT OF RIGHT TO PROPERTY

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The history of property begins with the advent of the civilisation of mankind. In the earliest period no one would have ever thought of acquiring any property. Human beings, like other animals, lived and died in the open. When the man, could know the mystery of fire¹, he got a superior status in the world. The fire warmed him and frightened off wild animals. With the help of fire he came to know how to make his weapons and utensils. But it was difficult for the early man to produce fire easily at the time of his need. Therefore he wanted to retain it. As he was already living in groups, by that time, he guarded the fire from going out of the group by sleeping round the fire at night. He began realising some kind of relationship with the place where he lived and guarded the fire. He soon found the immense use to which fire could be put in his daily life. For instance, he came to know, by accident, that cooked flesh tasted better than raw. He therefore jealously guarded the place where fire was once lit. A special bond grew up between him and the place where he produced fire. He thus realised that the exclusive possession was necessary for his survival without which he could not improve his lot. There are different theories² for the origin of this exclusive possession.

The right to property is based on a number of different grounds. According to Grotius and Blackstone it is based upon occupation. It is known as the popular theory. According to this theory originally the earth as well as other things upon it were *res nullius*. The ratio between the human beings and the land was such as to enable any one to occupy as much land as he liked. The man was roaming from place to place, using different plots of land and exhausting one by one. In due course with the increase of population, he felt it difficult to find unoccupied land. Consequently he began living upon the same land for indefinite period. Whoever would have first occupied a plot of land would be deemed to have the right to use it exclusively. Therefore according to this theory the property originated in occupation of things which were once *res nullius*.

According to Sir Henry Maine³, originally the mankind was living in groups composed on patriarchal model⁴. He illustrates his point by giving examples of Indian and Russian village communities, Roman Gens and Slavonian villages. He says that originally property belonged to these communities⁵ and gradually it passed through the families to the individuals⁶.

The natural law philosophers have based the right to private property on two fundamental grounds. The first is the ground of reason, for reason teaches us that without private property the individual man would lose his independence. A man without property must always be dependent on others. The second ground is

1. There are different theories of the invention of fire. One theory is that when the man had seen a forest blaze started by lightning he began to make search for the fire. Another theory is that it came to him by accident when some one in order to improve his wooden or stone tools rubbed them on the stone which produced spark. See Weech *History of the World* 27 B.

2. These theories are of two kinds—one explains the facts which gave rise to the institutions of property and the other attempts to justify or condemn the institution of private property (Paton *Jurisudence* (1951), 438). Here the attempt is made to give some well known theories of the first type.

3. Sir Henry Sumner Maine *Ancient Law* 211-22.

4. Maine emphasises this fact by saying that the earliest tribe which knitted men together in groups was contemporary with Maine. Early Institute was (1903) 64. See also Chatterjee *The Law relating to the Transfer of Immovable Property* 3.

5. Guesar remarked: No one has any fixed portion of land or land is appropriated to him in ownership. (*De bello Gallico* L. 5 C. 22) referred to by K. M. Chatterjee *Law relating to Transfer of Immovable Property* 40. According to a Roman tradition Romulus the first king who founded Rome in 753 B.C. gave two acres of land to each family for residential purposes and the bulk of the arable land was deemed to be the common property of the community. See Girard *A Short History of Roman Law* 23.

6. See K. M. Chatterjee, *Law relating to Transfer of Immovable Property* 4.

that of natural instinct because even a young child can distinguish between those things which have been given to it and those to which he has no claim. It is obvious that this so-called natural right to property is of no value unless it is protected by the law. No one therefore has a moral claim to the legal protection of his property if it is being used against the social interest of the community. Hence in all modern systems of law the right in property has never been unqualified. Thus for example a person may not use his property without any regard for the interests of his neighbours. The whole law of public and private nuisance is built upon this simple doctrine. Even in ancient times the rights of the owner were not absolute⁷. Take, for example, the right to dispose of one's own property⁸. In early days the conception of community ownership could not allow a transfer of ownership⁹. If the property belonged to a village, it could not be sold. The difficulty was soon realised and the community holding disintegrated among the families¹⁰. Of course this disintegration was gradual and through different modes in different societies¹¹. Even when the property came to belong to the family, transfer of the same, if not impossible, was very difficult, because it was thought that the religious fire and the family deities in the house guarded it from outward interference. The idea grew up that the family residence could not be transferred. As Cicero said :

"What is there more sacred than the dwelling place of each man? There is his altar, there burns the sacred fire, there exists his religion and all things sacred to him."¹²

K. M. Chatterjea puts it clearly :

"The *Manes* (*Pitris*=ancestors) and the fire had to be fed in secret, a deity guarded the precincts of every house, and *vastu* and *Lar* among the *Brahmans* and the Romans came respectively to signify both a God and a house."¹³

The result was that no one could ever think to transfer the family dwelling house. There was another difficulty. The owner could sell the property. But who was the owner? They believed that the property belonged to the family, that is, to all the members who were present as well as who were dead and also those who were to take birth afterwards. The persons, who were for the time being living in the family, were obliged to take care of the deceased ancestors called the *pitris* and the holy fire called *agni*. If the property belonged to all the members of the family, on the death of the head of the family, the heirs got only the duty to preserve the property and to serve the ancestors offering them the *pinda* or the funeral cake.

The heirs would take the property by reason of their birth. In Roman Law the term "*sui haeredes*" was used to denote family heirs. In Hindu Law the *Mitakshara* School recognised the birth right of the son¹⁴.

As the property belonged to the family and not to a particular individual, it could not be easily transferred by way of a gift or a sale. However, if all the living members consented, such a transfer was possible. Romans required for the transfer of a piece of land cumbersome formalities.¹⁵

7. Buckland, *A Text Book of Roman Law*, 189.

8. So we find, *Les Petronia* of 79 A.D. forbidding the masters from exposing their slaves to fight with beasts without sanction of the Magistrate. Lee, *Elements of Roman Law* (1956), S. 72.

9. Though Maine is widely criticised for his theory of community ownership, the fact remains that nearly all critics have accepted this community ownership in one or the other form in the primitive law. See Diamond, *Primitive Law*, (1950) 268-9.

10. Maine, *Ancient Law*, 222-3.

11. *Id.* at 223.

12. *Pro. Domo*. 41, referred to by K. M. Chatterjea, *Law, relating to Transfer of Immovable Property*, 41.

13. K. M. Chatterjea, *ibid.*, 41.

14. So Vignaneshwara approves the text of Gautama, "Let ownership of wealth be taken by birth". *Mitakshara*-1, i, 23—Gharpure, *The Mitakshara Vyavahara*, 179.

15. Land was deemed to be a *res Mancipi*. The transfer of a *res Mancipi* required *Mancipatio*. In *Mancipatio*, they required 5 witnesses and *libripens* along with the seller and the purchaser and certain formal words. See Gaius 1, 119—Edward Poste, *Elements of Roman Law by Gaius*, 96.

If the property belonged to the family the question naturally would arise what was deemed to be the property. The term property was used in its narrowest sense to include corporeal things only. It included even the human beings.¹⁶ In Rome even the twelve tables had recognised the power of the Pater Familias to sell his children like chattels.¹⁷ This gave rise to slavery. A person who purchased the child must have treated him as his property like other corporeal things. Later on when Rome conquered neighbouring countries and expanded its empire it was believed that the enemies and their properties were res nullius. Hence the prisoners of war were treated as slaves the property of the State. The State could sell them to public by auction or otherwise. The children of these slaves were also slaves. The power of the father to sell his child was recognised though with certain limitations,¹⁸ even in the time of Justinian in the sixth century.

✓ In India, Manu for the first time excluded the sons and the daughters from the term property. He says

'In a sacrifice known as Visvamt the whole property should be given yet the daughter, the son and the like should not be given.'¹⁹

Though the human beings were gradually excluded from the term property, the slaves were treated even in the most developed societies as chattels.

With the development of trade,²⁰ state services²¹ and learning²² the idea of separate ownership along with the family ownership arose.²³ In Rome originally peculium was recognised to be one's own property. From the time of Augustus peculium castrense²⁴ allowed to the military servants was treated to be the individual's own property. The idea was extended to peculium quasi castrense²⁵ and bona adventitia.²⁶ In India too we find the conception of individual ownership grew due to the development of trade and the recognition of the right of every male member in the family to claim partition.²⁷

✓ In Rome the word res²⁸ originally meant a corporeal property only. Gradually the owner was recognised to possess certain rights over the res.²⁹ The praetor

16 The Pater Familias was deemed to possess an absolute authority over everything which entered within the sphere of his action—Over his dead chattels as also over his living chattels over his wife and children and also over his guests the foreigners who visited Rome temporarily. Gardner's Short History of Roman Law 256.

17 See the remarks of Lee. As regards property the son in power was originally in no better position than a slave. Lee's Elements of Roman Law (1906) 61.

18 It was allowed in the case of a new born child with the reservation of the right of redemption and only in case of extreme poverty. Buckland's Roman Law (1921) 71.

19 Mandlik's Vyavahara & Mayukha 35.

✓ 20 See Mayne Hindu Law and Usage (1953) S. 251.

21 See Lee Law relating to Transfer of Immoveable Property 61.

22 Cf. The gains of learning shall be the sole property of the man by whom they have been acquired as also friendly presents marriage presents and presents in consecration of priestly functions. (Manu 9.206).

23 Manu says (Manu 9.208) 'What a brother has acquired by labour or skill without using the patrimony he shall not give up without his assent for it was gained by his own exertion'. Colebrooke's Digest of Hindu Law (1865) 1. 447.

24 A fund which consisted of what was obtained by a person from or through military service. It was allowed by Augustus to be treated as a property separate from the family property for certain purposes. See Lee Law relating to Transfer of Immoveable Property 61.2.

25 Constantine extended the rule of Augustus to certain civil services. Lee 16 d. 62.

1 Constantine also extended the rule to a fund which a child obtained from his mother. This right was further extended by later emperors to all acquisitions which a child would obtain through any source except from the father. Lee's Law relating to Transfer of Immoveable Property 62.

2 See Dr. N. G. Sen Gupta Evolution of Ancient Indian Law (1953) 170.1.

3 Cf. Mal of Mohamadan Law and Vastu of Hindu Law.

4 So the earliest procedure for a civil litigation—Legis Actio sacramenta in rem—was based on the possession of a res by its owner. Gaius iv. 16. See also Jolowicz's Historical Introduction to the Study of Roman Law (1954) 272.

began to give certain protections to a person who got possession of a thing without getting a legal title⁵ to it. In England we find that the courts⁶ did a little more than what the praetors had done in Rome and many new kinds of equitable titles came to be recognised⁷.

Again we find that the Romans began recognising that a person could create certain subordinate rights of ownership in favour of other persons. Thus the conception of *jura in re aliena*⁸ arose. Later on other different servitudes were also recognised. Apart from the servitudes, certain other rights in the property of a third person arose in the Imperial period. These were emphyteusis, superficies and pledge. In all of them one thing was common, namely that the owner, even though, he might have granted to others many of his rights, yet he was recognised to be the owner. This meant that the rights over the property of others were recognised. The word *res* came to denote an asset, that is the rights over one's own, corporeal things as well as rights over properties not in possession. The asset constituted an element of wealth. Any right which had money value was recognised to be a *res*. But this led to a difficulty. There were certain rights, having money value but not recognised to be a property. For example, a person is said to have property in respect of a plot of a story but he has no property in respect of his reputation, though both these rights have money value.

In Mahommedan Law the term *mal*, which is translated as property, is used in its narrowest sense. It means corporeal property only. Such a property must have four attributes : (i) The owner must have some advantage from the property. This naturally excludes dead bodies and human blood. (ii) The property must be of considerable value. Any thing of the value of less than one *false*⁹ is not treated as property. (iii) The owner must have possession over the thing. Consequently incorporeal properties are excluded. (iv) The owner must have a right to dispose of the property in any way he may like¹⁰.

Here we come to a conclusion that the demarcation between rights which amount to property and which do not amount to property is arbitrary.¹¹ The decision in a particular case depends upon the remedies available in the Courts of law. So we find in Rome the remedy of a formulary action in order to get condemnation. Such rights as were capable of estimation in money were recognised to be a *res*. Even in England in order to get the writ from the Court, services, rents and annuities were regarded as properties. If a tenure-holder failed to perform services to his lord, the lord would bring the same action as he would have brought to recover the land. The consequence was that the land and the services were both treated as properties.

The concept of property has not however remained static. But it has had always a social aspect. Emphasis on this aspect has, however, varied from age to age. Be that as it may a right to amount a property requires two ingredients: (i) money value and (ii) recognition by law. Both these ingredients are inter-

5. Technically the holder had no legal title but because of the protection provided by the praetor the possessor could claim title over the thing. Hence we find usucapion possession, *longi temporis praescriptio*, possession of provincial land, possession by aliens, bonitarian ownership etc., developed as new forms of Praetorian ownership. For details, see Buckland, *Equity in Roman Law* (1911), 4-6; Jolowicz, *Historical Introduction to the Study of Roman Law* (1954), 272-83.

6. The Chancery Courts applied the maxim that it will protect proprietary rights only. Now the lawyers tried their best to prove different kinds of proprietary rights in the contractual transactions. See Paton, *Jurisprudence* (1964), 481.

7. E.g., equitable estoppel, equitable set-off, execution by appointment of receiver, equitable waste, doctrine of merger, relief against forfeitures and equitable ownership were the new ideas in the Property Law which Equity Courts gave to the English Legal System. Hanbury, *Modern Equity* (1957), 41-58. See also Holdsworth, *A History of English Law*, vii, 23-4.

8. Rights in property owned by others.

9. A *fals* is an Arabian small copper coin.

10. Abdur Rahim, *Muhammadian Jurisprudence*, 262-3.

11. See Jenks, *English Civil Law*, ii, S. 1024.

dependent. Sometimes it is said that there must be an exchange value instead of money value¹² because there may be certain rights e.g., a father's right to the economic services of his infant child which are not property because they cannot be transferred. It is submitted that a particular right may be property even if for certain reasons it cannot be transferred¹³. For example section 6 Transfer of Property Act¹⁴ enumerates certain rights which are not transferable. This does not mean that they are not within the concept of property. They are all well recognised forms of properties but for reasons of public policy the law has forbidden their transfers. So Jessel M.R., observed

'There are many cases in which property arises from a contract quite independently of the fact that no judicial tribunal can enforce it. The mere fact that you cannot sue for the thing does not make it not Property'¹⁵

The second ingredient recognition by law is of greater importance. If the law refuses to recognise and protect a particular right no one can be deemed to have a legal right in the thing in question. It is therefore clear that if the law with draws such recognition a thing ceases to have the attribute of property¹⁶.

In a modern welfare State the Courts have been inclined to limit the scope of the term property by withdrawing the recognition under one or the other ground. For example, a right of fishery was a well recognised form of property as being a benefit arising out of land and as such it was always treated to be an immovable property¹⁷. But in *Ananda Behera v Orissa*¹⁸ the Supreme Court refused to give relief on the ground that the State had not taken away the petitioner's contract. Really in that case the estate vested in the State of Orissa which refused to recognise the contract under which the petitioner claimed his fishery rights. Earlier the Supreme Court had itself recognised in *Chhotabhai v Madhya Pradesh*¹⁹, that a contractual right in respect of land amounts to property and the State should not interfere with the same. But later on in *Shantabai v State of Bombay*²⁰, the Court took a different view. Mr Justice Bose in that case said that it was a mere contract and not a property and the petitioner at the most could claim damages. Thus we find that the Courts are showing a tendency to interpret the word property restrictively with the result that there is an indirect curtailment of the fundamental rights of the citizens²¹.

Thus we find that the trend in the law of property is again changing. On the one hand we recognise private ownership and give all possible protection to the owner. On the other hand the concept of public welfare claims to override the interest in private ownership. In effect we are going back to the earliest system of law where the property belonged to the community at large.

12 *McCoubert, Jural Relations* 324

13 It is not necessary that all properties must be transferable. See *Bans Gopal v P K Banerji* A.I.R. 1949 All 433 (436)

14 Act IV of 1882

15 *Ex pte Huggins* (1882) 21 Ch.D 80 50

16 *Cooley Constitutional Law* 392 cf *Bentham Theory of Legislation* 112. I cannot count upon the enjoyment of that which I regard as mine except through the promise of the law which guarantees it to me. See also *Bentham: Limits of Jurisprudence Defined* 85. 'If law existed property and law were born and died together take away law and property is at an end'

17 *Cheshire Modern Real Property* (1958) 121 *Mulla Transfer of Property Act* (19 6) 15-6 *Chitale v T anfer of P operty Act* (1950) 1 193 (*Jalkar's right—rights of fishery*) see also *Lakshman v Ramji* A.I.R. 1921 Bom 93 *Shibu Haldar v Gupta Sundari* (1897) 24 Cal 449 and *S taram v Petia* A.I.R. 1917 Nag 37

18 (1956) S.C.J 96 (1955) 2 S.C.R 919 (19 6) 1 M.L.J (S.C) 69 A.I.R 1956 S.C 17

19 (1953) S.C.J 96 (1953) S.C.R 476 A.I.R 1953 S.C 108

20 (1958) S.C.J 1078 (1959) S.C.R 265 A.I.R 1958 S.C 532

21 Cf M.P.J an *Indian Constitutional Law* 408. The Judiciary has however sought to interpret the word restrictively in order to limit the guarantee under Art 19(1) (f). The view strikes at the root of the protection of incorporeal rights.

In Article 19 (1) (f) of the Constitution it is provided that "All citizens shall have . . . the right to acquire, hold and dispose of property"²². But in clause (5) of the same Article the right is circumscribed in the interests of the *general public*. Here we recognise that the general public or the community at large is more important than the individual and therefore we can restrict even the Fundamental Rights of the individual. On the one hand we recognise, "whatever a man produces by the labour of his hand or his brain, whatever he obtains in exchange for something of his own, and whatever is given to him, the law will protect him in the use, enjoyment, and disposition of"²³. On the other hand, we are taking away a big portion of the *produce of labour* through different agencies of the taxing power. Even the Communist country Russia gives protection to its citizens, at least so far as the produce of labour is concerned. Article 10 of the U.S.S.R. Constitution says :

"The personal property right of citizens in their incomes and savings from work, in their dwelling houses and subsidiary house enterprises, in articles of domestic economy and articles of personal use and convenience, as well as the right of citizens to inherit personal property, is protected by law."

Article 31, of our Constitution in the name of protecting the proprietary rights of a person says :

"(1) No person shall be deprived of his property save by authority of law."

And the next moment it gives a very wide power of deprivation to the State in the same article. It says :

"(2) No property shall be compulsorily *acquired* or *requisitioned* save for a *public purpose* and save by *authority of a law* which provides for compensation for the property so acquired or requisitioned and either fixes the amount of the compensation or specifies the principles on which, and the manner in which, the compensation is to be determined and given; and *no such law shall be called in question in any Court on the ground that the compensation provided by that is not adequate.*"²⁴

We were not satisfied even with this much of the power and added Article 31-A to give a free hand to the State²⁵.

Even the first reading of these articles make it clear that the present conception of property is that an individual is a part of the community, and therefore his property must also be taken to be the part of the community. It is the duty of the community to give full protection to individual's property and the moment it needs the property for the general good, it can acquire it. Clause (2) of Article 31 has very safely guarded the interest of the community by denying the fundamental right guaranteed in the first clause. Clause (2) provides that the State can acquire the property on fulfilling 3 conditions *viz.*, (1) acquisition must be for public purpose; (2) it must be under the authority of law; and (3) it must be by payment of compensation. If we examine these conditions minutely, we will find that the Legislature is given a free hand and it can take away the property from an individual, even without payment of an adequate compensation. Professor Rao¹, while discussing the property rights under the Constitution, has very correctly analysed the motives behind our Constitution. According to him the Constitution is motivated by two inconsistent desires, one to give an impressive paraphernalia of Fundamental Rights

22. So the most of the Constitutions of the world have done. The Constitution of U.S.A. would say, "No person shall be deprived of his life, liberty or *property* without due process of law" (14th Amendment to the Constitution). In England, the Magna Carta provided in 1215, "No free man shall be dispossessed or divested of his freehold . . . but by the law of the land."

23. Cooley, *Constitutional Law*, p. 392. Cf. Bentham, *Theory of Legislation*, 110 : "Law... Says : Labour, and I will insure it by arresting the hand which may seek to ravish it from you."

24. Emphasis supplied.

25. Article 31-A was brought in the present form by the Constitution (Fourth Amendment) Act, 1955.

1. Chief Justice Sinha and Property Rights, (1964) 6 J.I.L.I. 153. For Prof. Rao's earlier opinion, see "The Problem of Compensation and its Justiciability in Indian Law", (1962) 4 J.I.L.I. 481.

and the other to reserve as much power as possible in the hands of the Government. He says

"The framers could not help succumbing to the temptation of passing a 'popular' and right oriented Constitution. They took care to hedge in the rights conferred on the people by numerous restrictions intended to reduce those rights to the level of mere showpieces with a purely propagandist value."

What is a 'public purpose'? The term 'public purpose' is so wide and elastic that it is very difficult to define it.² According to Mahajan, J., it can only be adjudged in the context of the particular enactment and according to the time and need of the society, when it is construed.³ Mudholkar, J. who was delivering the majority judgment in *Somawants v State of Punjab*⁴, clearly stated

"Public purpose is bound to vary with the times and the prevailing conditions in a given locality and therefore it would not be a practical proposition even to attempt a comprehensive definition of it."⁵

It has, however, been accepted that an acquisition is deemed to be for public purpose, if it is made in the general interest of the community as distinguished from the private interest of an individual.⁶ In this sense the concept of public purpose is public welfare. Fortunately the Courts have the power to decide as to whether a particular purpose is a public purpose or not.⁷ But the Courts have given a liberal interpretation to the term 'public purpose'. It has even been held in many cases that if the property is acquired for one individual under a scheme from which public may derive advantage it is deemed to have been acquired for public purpose.⁸ It may be noted that in such a case the persons to be benefited must get the benefit not as individuals but in furtherance of a scheme of public benefit.

In the following cases the Courts have held that the acquisitions were for public purposes—

(i) An acquisition for purposes of enabling a private industrial undertaking to build dwelling houses and provide amenities for its workmen.⁹

(ii) An acquisition for a private company, engaged in the production of certain chemicals necessary for the existing economic situation of the country in order to save foreign exchange¹⁰, or, for setting up a factory for the manufacture of refrigeration compressors.¹¹

(iii) An acquisition for housing a member of the staff of a Foreign Consulate necessary for the trade and commerce of the country.¹²

² *State of Bombay v Laxmi* (1956) 2 S.C.J. 288 (1956) S.C.R. 18 at 25 AIR 1956 S.C. 294

³ *State of Bihar v Kamshur Singh* (1952) S.C.J. 354 (1952) S.C.R. 889 AIR 1952 S.C. 252

⁴ (1963) 2 S.C.J. 35 (1963) 2 M.L.J. (S.C.) 18 (1963) 2 An.W.R. (S.C.) 18 (1963) 2 S.C.R. 774 AIR 1963 S.C. 151 163

⁵ *Ibid* at page 163

⁶ *State of West Bengal v Mrs. Bella Banerjee* (1954) S.C.J. 95 (1954) S.C.R. 508 (1954) 1 M.L.J. 162 AIR 1954 S.C. 170 *Kamalamma v State* AIR 1960 Ker 321

⁷ *Somawants v State of Punjab* (1963) 2 S.C.J. 35 (1963) 2 M.L.J. (S.C.) 18 (1963) 2 An.W.R. (S.C.) 18 (1963) 2 S.C.R. 774 AIR 1963 S.C. 151 *R.K. Agarwalla v State of West Bengal* AIR 1965 S.C. 993 *State of Bombay v R.S. Nayu* (1956) S.C.J. 288 (1956) S.C.R. 18 AIR 1956 S.C. 294 *Jhanda Lal v Punjab* AIR 1959 Punj 535 *Bombay v Bhanyu Nayu* (1955) S.C.J. 10 (1955) 1 S.C.R. 777 AIR 1955 S.C. 41 *Kamalamma v State* AIR 1960 Ker 321

⁸ *Barkya Thakur v State of Bombay* AIR 1960 S.C. 1203

⁹ *Motibhai v State of Gujarat* AIR 1961 Guj 93

¹⁰ *Somawants v State of Punjab* (1963) 2 S.C.J. 35 (1963) 2 M.L.J. (S.C.) 18 (1963) 2 An.W.R. (S.C.) 18 (1963) 2 S.C.R. 774 AIR 1963 S.C. 151

¹¹ *State of Bombay v Ali Gulshan* (1955) 2 S.C.R. 857 (1955) S.C.J. 822 AIR 1955 S.C. 810

(iv) An acquisition for housing an officer of the State Road Transport Corporation for the efficient discharge of his functions.¹²

(v) An acquisition for preventing concentration of holdings in the hands of a few individuals,¹³ housing homeless people¹⁴, clearing slum areas and relieving congestion¹⁵ or rehabilitation of refugees¹⁶.

(vi) An acquisition for a society for maintaining student's home, publication departments and guest houses¹⁷, etc.

The aforesaid list of acquisitions, accepted by the Courts, as for public purpose, makes it clear that the tendency of the present day Judiciary is not to disturb the legislation, so far possible on the ground that they are not for public purpose. We now turn to the question of compensation. The State has to pay compensation, but the quantum of compensation is wholly a matter for the State to decide. The American Constitution provides a just compensation.¹⁸ They take it as an owner's loss and not as the taker's gain, as the basis for compensation. The owner is entitled to a fair market value at the time of taking.¹⁹ In England, the Parliament is supreme and can take away the property of the individual even without payment of compensation but unless it provides expressly in unequivocal terms the Courts presume that reasonable compensation was intended by the Parliament.²⁰ Blackstone says :

"So great is the regard of the law for private property, that it will not authorise the least violation of it; no, not even for the general good of the whole community. If a new road, for instance, were to be made through the grounds of a private person, it might perhaps be extremely beneficial to the public.....the Legislature alone can..... interfere and compel.....by giving him a full indemnification and equivalent for the injury thereby sustained."²¹

On the question of compensation, there are different aspects : (1) Whether the property is compulsorily acquired or requisitioned within the meaning of clause (2) of Article 31 or the owner has been merely deprived of his property under the Police power or taxing power of the State in which case the question of compensation does not arise; (2) Whether, even if the property is compulsorily acquired or requisitioned, there is a law, which provides for the transfer of the ownership or right to possession of any property to the State or to a corporation owned or controlled by the State, or there is no such transfer of ownership or right to possession. In the later case, clause (2-a) of Article 31 excludes the application of clause (2); (3) Whether, if the property is compulsorily acquired, is it not saved by Article 31-A or by Article 31-B? ; (4) Whether, even if the particular law is not saved by Articles 31-A and 31-B, does it provide for *any* compensation or not? If it provides even an inadequate compensation, it is fully protected,²² unless the compensation is illusory.²³

12. *State of Bombay v. R. S. Nanji*, (1956) S.C.J. 288 : (1956) S.C.R. 18 : A.I.R. 1956 S.C. 294.

13. *State of Bihar v. Kameshwar Singh*, (1952) S.C.J. 354 : (1952) S.C.R. 889 : A.I.R. 1952 S.C. 252.

14. *State of Bombay v. Bhanji Munji*, (1955) S.C.J. 10 : (1955) 1 S.C.R. 777 : A.I.R. 1955 S.C. 41.

15. *Bhagwat Dayal v. Union of India*, A.I.R. 1959 Punj. 544 ; *Ifthikhar Ahmad v. State of Madhya Pradesh*, A.I.R. 1961 M.P. 140. See also *Moosa v. State of Kerala*, A.I.R. 1960 Ker. 355.

16. *Safi v. State of West Bengal*, A.I.R. 1951 Cal. 97 ; *Gurdial Kaur v. The State*, A.I.R. 1952 Punj. 55.

17. *R. K. Agarwalla v. State of West Bengal*, A.I.R. 1965 S.C. 995.

18. The Fifth Amendment to the Constitution of U.S.A.

19. *U. S. v. Miller*, (1943) 317 U.S. 369.

20. *A. G. v. De Keyser's Hotel*, L.R. 1920 A.C. 508.

21. Blackstone, *Commentaries*, i, 139.

22. *Somawanti v. State of Punjab*, (1963) 2 S.C.J. 35 : (1963) 2 M.L.J. (S.C.) 18 : (1963) 2 An.W.R. (S.C.) 18 : (1963) 2 S.C.R. 774 : A.I.R. 1963 S.C. 151.

23. See the observations of Wanchoo, J., in *Karimbil Kunthikoman v. State of Kerala*, (1962) 1 S.C.J. 510 : (1962) 1 S.C.R. (Supp.) 829 : (1962) 1 M.L.J. (S.C.) 213 : (1962) 1 An.W.R. (S.C.) 213 : A.I.R. 1962 S.C. 723.

In 1950, when the Constitution was adopted, Article 31,²⁴ taking the wordings of section 299 of the Government of India Act, 1935,²⁵ simply provided for the acquisition for a public purpose and on payment of compensation. Though, clause (4) was added to save the legislations pending in different States for the abolition of the Zamindari system, the Patna High Court¹ found it difficult to sustain the legislation as *intra vires* of the Constitution. The Allahabad High Court², however, gave a contrary opinion. The State of Bihar in one case and the Zamindars of Uttar Pradesh in the other went up on appeal to the Supreme Court. While these appeals were still pending, in order to avoid litigation, the Parliament, which consisted, prior to the first general election of 1951, of the same persons who were the members of the Constituent Assembly, amended the Constitution in order to save the then existing different legislations on abolition of Zamindari system.

In the leading case of *Mrs Bela Banerjee*³, where the Government wanted to acquire property at a price prevailing on 31st December, 1946, the Supreme Court, upholding the judgment of the Calcutta High Court, held that the amount of compensation must be a just equivalent of what the owner has been deprived of. It was further observed that the fixing of compensation without reference to the market value of the land was arbitrary and against the spirit of the requirements of Article 31 (2) of the Constitution. The Supreme Court stated:

"While it is true that the Legislature is given the discretionary power of laying down the principles which should govern the determination of the amount to be given to the owner for the property appropriated such principles must ensure that what is determined as payable must be compensation that is a just equivalent of what the owner has been deprived of. Within the limits of this basic requirement of full indemnification of the expropriated owner the Constitution allows free play to the legislative judgment as to what principles should guide the determination of the amount payable. Whether such principles take into account all the elements which make up the true value of the property appropriated and exclude matters which are to be neglected, is a justiciable issue to be adjudicated by the Court⁴."

The Parliament⁵, finding difficulties particularly in the way of abolition of intermediaries between the State and the tiller of the soil, amended Articles 31 and 31-A of the Constitution by the Constitution (Fourth Amendment) Act, 1955. It was felt that the limited financial resources of the State could not permit the payment of full compensation. The amended Articles now provided *inter alia*, that the law should not be called in question in a Court of law on the ground of the inadequacy of compensation.⁶

24 Article 31 (2) of the Constitution in 1950, read as follows: "No property shall be taken possession of or acquired for public purposes unless the law provides for compensation for the property taken possession of or either fixes the amount of compensation or specifies the principles on which and the manner in which the compensation is to be determined and given."

25 Section 299 of the Government of India Act 1935 ran: "Neither the Federal nor a Provincial Legislature shall have power to make any law authorising the compulsory acquisition for public purposes of any land or any commercial or industrial undertaking of any interest in or in any company owning any commercial or industrial undertaking unless the law provides for the payment of compensation for the property acquired and either fixes the amount of the compensation or specifies the principles on which and the manner in which it is to be determined."

1 *Kamshwar Singh v State of Bihar*, A I R 1951 Pat 91 (S B)

2 *Suryapal Singh v Uttar Pradesh Government* A I R 1951 All 674

3 *State of West Bengal v M s B la Banerjee* (1954) S C J 93 (1954) S C R 558 (1954) 1 M L J 162 A I R 1954 S C 170

4 *Ibid* at page 172

5 There were two other decisions (*State of West Bengal v Subodh Gopal Bose* (1954) S C J 127 (1954) S C R 587 A I R 1954 S C 99 and *Dwarkanath Shrinivas v Sholapur Mills*, (1954) S C J 175 (1954) S C R 674 (1954) 1 M L J 355 A I R 1954 S C 119, which also prompted the addition of clause (2 A) to Article 31 of the Constitution by the Fourth Amendment)

6 Article 31 (2) of our Constitution says: "And no such law shall be called in question in any Court on the ground that the compensation provided by that law is not adequate"

In 1960 the Supreme Court, in *K.K. Kochuni v. State of Madras*⁷⁻⁸, confined the amended Article 31-A to its application to enactments which were intended only for agrarian reforms. Even prior to the *Kochuni's case*⁷⁻⁸ the Supreme Court had already observed that the core of Article 31-A was agrarian reform.⁹ But the term, 'agrarian reform' was given a very wide interpretation.¹⁰ In *Ranjit Singh v. State of Punjab*¹¹, the Supreme Court considered its earlier decisions in different cases and observed that the concept of agrarian reform as given in the *Kochuni's case*⁷⁻⁸ should obtain a liberal interpretation. Mr. Justice Hidayatullah, who delivered the judgment of the Court gave a very wide interpretation, saying :

"The scheme of rural development today envisages not only equitable distribution of land so that there is no undue imbalance in society resulting in a landless class on the one hand and a concentration of land in the hands of a few, on the other, but envisages also the raising of economic standards and bettering rural health and social conditions. Provisions for the assignment of lands to village panchayats for the use of the general community, or for hospitals, schools, manure pits, tanning grounds, etc., enure for the benefit of rural population and must be considered to be essential part of the re-distribution of holdings and open lands to which no objection is apparently taken. If agrarian reforms are to succeed, mere distribution of land to the landless is not enough. There must be a proper planning of rural economy and conditions and a body like the village panchayat is best designed to promote rural welfare than individual owners of small portions of lands".

"The settling of a body of agricultural artisans (such as the village carpenter, the village blacksmith, the village tanner, farrier, wheelwright, barber, washerman, etc., etc.) is a part of rural planning and can be comprehended in a scheme of agrarian reforms. It is a trite saying that India lives in villages and a scheme to make villages self-sufficient cannot but be regarded as part of the larger reforms which consolidation of holdings, fixing of ceilings on lands, distribution of surplus lands and utilising of vacant and waste lands contemplate¹²".

In the recent case of *Vajravelu v. Special Deputy Collector*¹³, Article 31 was closely examined. In that case, the Madras Legislature enacted the Land Acquisition (Madras Amendment) Act, 1961, in order to provide for the acquisition of lands for housing schemes in the neighbourhood of Madras City. It laid down the general principles for fixing the compensation which differed from those prescribed in the Land Acquisition Act. Though the impugned Act was declared *ultra vires* Article 14 of the Constitution, yet on the question of the adequacy of compensation the Supreme Court upheld the Act on the basis of the Fourth Amendment and ruled that it could not be questioned on the ground that it did not provide for a "just compensation".

There may arise a case in which, in order to avoid the question being agitated in a Court, the Legislature may provide for compensation, which may turn out to be quite illusory. In such a case the Courts have a right to interfere and declare the legislation *ultra vires*. In *Vajravelu's case*¹³, Subba Rao, J., expressed the opinion

7-8. A.I.R. 1960 S.C. 1080. For a critical study of *Kochuni's case*, see J. Narain 'Deprivation of Property and right to hold property under the Indian Constitution : A Study of *Kochuni Decision*', (1964) 6 J.I.L.I. 410.

9. *Atmoram v. State of Punjab*, (1959) S.C.J. 407 : (1959) 1 S.C.R. (Supp.) 748 : A.I.R. 1959 S.C. 519.

10. *Sri Ram Rom Narain Medhi v. State of Bombay*, (1959) S.C.J. 679 : (1959) 1 S.C.R. 489 : (1959) 1 An.W.R. (S.C.) 1 : (1959) 1 M.L.J. (S.C.) 1 : A.I.R. 1959 S.C. 459. *Gangadhar Rao v. State of Bombay*, (1961) 2 S.C.J. 398 : (1961) 1 S.C.R. 943 : A.I.R. 1961 S.C. 288 ; *State of Bihar v. Romeshwar Prasad*, (1962) 2 S.C.R. 382 : (1963) 1 S.C.J. 415 : A.I.R. 1961 S.C. 1649 ; *Sonapur Tea Co., Ltd. v. Deputy Commissioner*, (1962) 1 S.C.R. 724 : A.I.R. 1962 S.C. 137 ; *State of Bihar v. Umesh Jha*, (1962) 2 S.C.R. 687 : A.I.R. 1962 S.C. 50.

11. A.I.R. 1965 S.C. 632.

12. *Ibid.* at 639.

13. (1964) 2 S.C.J. 703 : (1964) 2 M.L.J. (S.C.) 173 : (1964) 2 An.W.R. (S.C.) 173 : A.I.R. 1965 S.C. 1017.

that if the compensation is illusory the Courts have power to declare the law *ultra vires*. He said.

"If a law says that though a house is acquired, it shall be valued as a land or that though a house site is acquired, it shall be valued as an agricultural land or that though it is acquired in 1950 its value in 1930 should be given, or though 100 acres are acquired compensation shall be given only for 50 acres, the principles do not pertain to the domain of adequacy but are principles unconnected to the value of the property acquired. In such cases the validity of the principles can be scrutinized. The law may also prescribe a compensation which is illusory. It may provide for the acquisition of a property worth lakhs of rupees for a paltry sum of Rs. 100. If the compensation is illusory or if the principles prescribed are irrelevant to the value of the property at or about the time of its acquisition, it can be said that the Legislature committed a fraud on power and, therefore, the law is bad¹⁴."

But in *Somawanti v. State of Punjab*¹⁵, which was a case under section 6 (i) of the Land Acquisition Act, 1894 providing for the acquisition of land for public purpose on payment of compensation, 'wholly or partly' out of public revenues, the State had provided Rs. 100 only on account of compensation for a property worth more than Rs. 4 lakhs. The Supreme Court, by its majority judgment, upholding the acquisition, held that even this nominal contribution satisfied clause (1) of section 6 of the Act. Subba Rao, J.¹⁶, who gave the dissenting judgment however pointed out that the payment of even a part of a compensation must have some rational relation to the compensation payable in respect of the requisition for a public purpose. He said that the part must be a substantial part and Rs. 100 cannot be taken to be a substantial part of the amount of Rs. 4 lakhs.

A new turn has been given to the property rights by the 17th Amendment of the Constitution. While the enactments meant for agrarian reforms and other ancillary purposes were still protected, the Amendment has provided for a just compensation in the case of buildings and land under the personal cultivation of the person holding the estate. A new proviso has been added to Article 31-A in order to bring the said changes. The new proviso runs as follows:

"Provided further that where any law makes any provision for the acquisition by the State of any estate and where any land comprised therein is held by a person under his personal cultivation, it shall not be lawful for the State to acquire any portion of such land as is within the ceiling limit applicable to him under any law for the time being in force or any building or structure standing thereon or appurtenant thereto, unless the law relating to the acquisition of such land, building or structure, provides for payment of compensation at a rate which shall not be less than the market value thereof."

Apparently a great relief was given to the holders of land upto the ceiling limit fixed by the State. But it has taken away, really many important rights of the individual. Firstly, saving upto the ceiling has no meaning, because the ceiling is to be fixed by the State. Though it is admitted that the ceiling cannot be fixed in an uniform manner by any law, still it is too much to expect that the State will not reduce the ceiling in order to avoid payment of compensation as a matter of policy. Secondly, a long list of 44 enactments¹⁷ have been added in the IXth Schedule¹⁸ and it cannot be ruled out that many more enactments will not be added in future so as to take away the justiciability of such enactments from the jurisdiction of the Courts of law. Prof. B. Errabbi commenting upon the Amendment says

14 *Ibid* at t024

15 (1963) 2 S.C.J. 3; (1963) 2 M.L.J. (S.C.) 18 (1963) 2 A.W.R. (S.C.) 18 (1963) 2 S.C.R. 774 A.I.R. 1963 S.C. 151

16 *Ibid* at t72

17 Originally the First Amendment listed 13 enactments only. The Fourth Amendment added another seven different enactments.

18 Article 31 B validates the enactments enumerated in the IXth Schedule.

"The recent addition of some more Acts to the list in the unpleasant schedule is undemocratic for it deprives Judiciary of its rightful place in a democratic Constitution.... The listing in schedule IX a number of Acts, however oppressive and unconstitutional (in other respects) they may be, would make the Judiciary a helpless spectator of the injustice meted out to the individuals¹⁹".

It has, however, been suggested that Article 31-B may provide some incentive to the Legislatures to reconsider the provisions of their hasty legislation, particularly, when the Judiciary expresses its disapproval to these provisions.²⁰

It is interesting to note, at this point, that clause (2) of Article 31, which requires *inter alia* the payment of compensation, does not apply to a law which was existing at the time of the commencement of the Constitution except in certain exceptional cases.²¹ Though Article 13 clearly provides that all the laws in force immediately before the commencement of the Constitution must be deemed to be void if they are inconsistent with the provisions of Part III of the Constitution dealing with the fundamental rights but because of the limit set forth in clause (5) of Article 31, clause (2) of that Article does not apply to the laws which were existing at the commencement of the Constitution. In *Somawanti v. State of Punjab*²², the Supreme Court confirmed its earlier judgments²³, that Article 31 (5) (a) excludes Article 31 (2) and Article 19 (1) (f). The result of this exclusion is that even if the compensation is not provided, the acquisition cannot be challenged. In *N. G. Upadhyaya v. State of U.P.*²⁴, the Land Acquisition Officer categorically refused to pay any compensation for acquiring the rights of the tenants and the Allahabad High Court found itself unable to help the petitioners only because the land was being acquired under a pre-constitutional law.

To sum up, we find that the concept of property ownership began with the community ownership. From the community it was taken over by the family and from the family by the individual. Now the State is taking control of the private property. In Communist countries this change over is nearly complete. The Soviet Union has already taken control of the landed properties and of the major means of production²⁵. In other countries also we are progressing towards the same goal.

In the United States according to the doctrine of Eminent Domain it is recognised that the property, acquired by the citizen under the protection of the State, can be taken away by the State which represents the community at large, for the public benefit even against the wishes of the owner. The only limit is that just compensation should be paid.

Here we come to a stage where we have to think about the price of liberty we are paying. Since long we have recognised life, liberty and property as the natural

19. B. Errabbi; *Constitutional Developments pertaining to property and the Seventeenth Amendment Act*, (1964) 6 J.I.L.I., 196 at p. 211-2. See also S. L. Agarwal 'Constitution, 17th Amendment Act, 1944 : Its validity', (1965) 7 J.I.L.I. 252.

20. *Ibid.* at 212.

21. Article 31 (6) provides that any State law, enacted within eighteen months prior to the commencement of the Constitution and submitted within three months after such commencement to the President for certification and if the President certifies, then it shall not be questioned in any Court on the ground that it contravenes clause (2) of Article 31.

22. (1963) 2 S.C.J. 35 : (1963) 2 M.L.J. (S.C.) 18 : (1963) 2 An.W.R. (S.C.) 18 : A.I.R. 1963 S.C. 151, 160.

23. *Babu Barkya Thakur v. State of Bombay*, A.I.R. 1960 S.C. 1203 ; *Lilavati Bai v. State of Bombay*, (1957) S.C.J. 557 : (1957) S.C.R. 721 : A.I.R. 1957 S.C. 521 and *State of Bombay v. Bhajji Munji*, (1955) S.C.J. 10 : (1955) 1 S.C.R. 777 : A.I.R. 1955 S.C. 41.

24. A.I.R. 1965 All. 356 (364).

25. Article 6 of the Soviet Constitution says : "The land, its mineral wealth, waters, forests, mills, factories, mines, Rail water and air transport banks communications, large State organised agricultural enterprises as well as municipal enterprises and the bulk of dwelling houses in the cities and industrial localities, are State property, that it belongs to the whole people". The Indonesian Constitution accepts it in the following words, "The national economy shall be organized on a co-operative basis. land and water and the natural riches contained therein shall be controlled by the State and exploited for the greatest benefit of the people." Article 38 of the Constitution of Indonesia (1950).

rights of every individual. In order to achieve full fledged freedom it is necessary that the individual should feel that his property is fully protected by law. We are, actually, going towards the opposite direction. Here an individual has no freedom as to his property. He is absolutely dependent upon the interest of the general public at large. We see that the interest of the general public is decided by the Legislature, which is dominated by the ruling party and the ruling party itself is run by a small group of persons who happen for the time being in power in the Legislature, hence, it is for them to decide as to what is the interest of the general public. It has been seen above that the Courts do not usually interfere with the question of public interest nor are they allowed to question the adequacy of compensation. Consequently, the group in power can take away even the natural rights of an individual to fulfil its own notion of reform. Apart from controlling his participation in the public property, these notions take away, in a large way, the property of the individual for no fault of the individual. Apart from the specified enactments saved by Article 31 B of the Constitution, Articles 31 (5) and 31 A provide certain circumstances in which the property of the individual may be acquired and still he has no claim, either of a reasonable opportunity or of a fair compensation. While discussing from a different angle, Prof. Charles A. Reich¹, observed that it is very dangerous to give control to the Government machineries for determining the question of public interest and under that control, allow them to control the freedom of private property. He said that we cannot permit any official to pretend that he has sole knowledge of the public interest. He says

"If the individual is to survive in a collective society, he must have protection against its ruthless pressures. There must be sanctuaries or enclaves where no majority can reach. To shelter the solitary human spirit does not merely make possible the fulfilment of individuals, it also gives society the power to change, to grow and to regenerate, and hence to endure. These were the objects which property sought to achieve, and can no longer achieve. The challenge of the future will be to construct, for the society that is coming institutions and laws to carry on this work²."

It has also been seen that the Parliament has amended the provisions of the Constitution relating to the property rights thrice³, in the exercise of the power given to it under Article 368 of the Constitution. Under this Article the Parliament can amend Part III of the Constitution dealing with the fundamental rights, by a majority of total membership in each of the two houses provided this majority is not less than two thirds of the members of each house present and voting. Though the Supreme Court has declared such amendments as *intra vires* the Constitution⁴, yet the method of amendment has been widely criticised⁵. With reference to the 17th Amendment it has even been said, that if by an easy amendment of the Constitution, the Parliament validates as many as forty four State Acts, it can very easily add any number of Acts in the Ninth Schedule and thereby, practically take away the powers of the Courts. In such a case the idea of Fundamental Rights itself, would become illusory⁶.

There is another point to be noticed here. In modern times the landed property has no practical importance. Due to the growth of industry and trade, one

1 Charles A. Reich, *The New Property* (1964) 73 Yale Law Jour. 733

2 *Ibid* at 787

3 The Constitution (First Amendment) Act 1951. The Constitution (Fourth Amendment) Act, 1950 and the Constitution (Seventeenth Amendment) Act 1964

4 *Shankar Prasad v. Union of India* (1951) S.C.J. 775. (1952) S.C.R. 89. (1951) 2 M.L.J. 683. A.I.R. 1951 S.C. 458. *Sajan Singh v. State of Rajasthan* (1965) 1 S.C.J. 377. (1965) 1 M.L.J. (S.G.) 57. (1965) 1 An.W.R. (S.G.) 57. A.I.R. 1965 S.C. 815

5 See note 19 on page 57

6 S. L. Agarwal, *Constitution, Seventeenth Amendment Act 1964 Its Validity*, (1965) 7 J.L.L. 257 at p. 259

would like to invest his money in shares instead of real properties. Due to a number of restrictions⁷, it is very difficult, these days even to manage the landed properties. One cannot hold property beyond a certain limit; he cannot ask his tenant to vacate the property. One can neither construct nor demolish his house without a proper sanction of the municipal authorities. In the present age we are again moving from place to place either because of the present service conditions or because of trade. It is, therefore, very difficult to hold immovable property. There is no certainty that a person will die at the same place where he took his birth. There is no certainty that if you have settled at certain place, your children must remain at that place. One can very easily hold share certificates worth any amount but cannot hold landed properties without limit. He can deposit his money in banks and can very easily earn more than the return which he might get from the landed properties. Though the opinion is divided but the most accepted opinion, both in the United States⁸ and India⁹, is that money and choses in action cannot be compulsorily acquired. Mukherjea, J., says:

“Taking money under the right of “Eminent Domain” when it must be compensated by money afterwards could be nothing more or less than a forced loan and it is difficult to say that it comes under the head of acquisition or requisitioning of property.¹⁰”.

The result is that in the present age we believe more secure with movable properties, especially with money and actionable claims.

7. Tenancy Laws, Municipal Laws, land ceilings, registration expenses etc.

8. Willis, *Constitutional Law* (1936), 816. See however Nicholas, *Eminent Domain*, I 100.

9. *State of Bihar v. Kameshwar*, (1952) S.C.J. 354 : (1952) S.C.R. 889 : A.I.R. 1952 S.C. 252. See also *Bombay Dyeing Company v. State of Bombay*, (1958) S.C.R. 1122 : (1958) S.C.J. 620 : A.I.R. 1958 S.C. 328.

10. *Id.* at 280.

GOVERNMENTAL CONTRACTS

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INTRODUCTION *Justitia est constans at perpetua voluntas jus summi cuique tribuens*—The purpose of all law Justinian said in his Institutes is to give to everyone what is due to him. This is best achieved through creation and vindication of legal rights and legal duties through State machinery. Contract is one of the processes towards this end. A contract as Romans regarded consists of vesting of volitional right in a certain person and charging the other with obligation. In other words with the presence of above reciprocity a *vinculum juris* comes into existence—a legal tie which the law will enforce.

State is a legal person and on that account there has been reasonable uniformity in the approach that State being a legal person and endowed with capacity to sue and be sued in its own name and power to hold or dispose of property under a certain legal manner is as much liable as a private individual under the ordinary law of contract would be liable. Whatever may be the justification for this rule in its formative stage it is quite clear that today when the State is the largest business unit also great injustice will be caused if the rule is taken otherwise. Thus taking it for granted that the contractual liability of the Government has ever been a matter of law—a part of the law of the land rather than caprices of policy it is proposed to examine the pivot and the development thereof around which contractual liability of the Government—Union or State clusters.

I Legislation.—So far as the present Constitution of India is concerned there are only two Article which are relevant. These are Articles 299 and 300 grouped under Part XII Chapter III captioned Property Contracts Rights Liabilities Obligations and Suits. Both these Articles are formal in the sense that while Article 299 specifies the manner that Government contracts shall be expressed and executed in the name of Head of State (President or Governor) by appropriate Government agency who shall not be personally liable. Non liability of State officials engaged in the discharge of obligations and undertakings was declared by Lord Mansfield in the celebrated case of *Macbeath v Haldimand*¹ as early as 1786. The next article (Article 300) covers the field of suabity of the State generally as equal to that under the previous Constitution Acts—1935² 1915³ 1858⁴. Since this Article is declaratory of contractual liability of the Government under the existing law saved by the Constitution (Article 372) it is pertinent to explore the authority therefor.

It is clear that whole question turns upon a proper construction of section 65 of the Imperial Government of India Act 1858 by virtue of which the extent of governmental liability has got to be determined. After providing for transfer of paramountcy of the East India Company upon the territories to the Crown of England the Act by section 65 provided

1 1 Term Rep 172 See Shukla Dr V N Constitution of India p 421

2 Sect on 1 6

3 Sect on 32

4 Section 63

"The Secretary of State in Council shall and may sue and be sued as well in India as in England by the name of the Secretary of State in Council as a body corporate and all persons and bodies politic shall and may have and take the same suits, remedies and proceedings, legal and equitable, against the Secretary of State in Council of India as they could have done against the same Company".

It is to be marked that this important provision has two facets. The first clause specifies that suability shall be vested in the Secretary of State which in England is vested in different corporate bodies—Ministers, Post Master-General, Attorney-General and the like. This clause has nothing to do with extent of liability which is governed by the succeeding clause. That is the liability of the Government or rights and remedies of the individual shall be equal to those as possessed by the preceding East India Company. The extent of liability of East India Company can be ascertained judicially.

The judicial decisions determining liability of the East India Company or the Government though numerous in the field of Tort were meagre in the field of **Contracts**. One reason may be that even in the Government circles throughout, barring one or two whispers of useless dissent, contractual liability of the Indian Government was regarded as equal more or less to that of a private individual under the ordinary law of the land. Even before the passing of the Government of India Act, 1858, the British Parliament in its Charter Act, 1833, directed the East India Company itself to administer the territory in trust for the English Sovereign. This Act has greater constitutional significance because this is the only legislative instrument which defined the suability of the East India Company itself. It provided that the Company can sue and be sued legally and equitably, as if it has done the act for itself. Legislative authority therefore so far as it goes is to the effect that the liability of the Government in contract is equal to that of the East India Company prior to 1833. Even a legislation contrary to it would be *ultra vires* as violative of section 65 of the Constitution Act, 1858, was the outcome of P.C. judgment in *Secretary of State v. Moment*⁵ where a Burma Act tried to take away right to sue, Lord Haldane stated the rule finally. "Their Lordships are of opinion that the effect of Sec. 65 of the Act of 1858 was to debar the Government of India from passing any Act which could prevent a subject from suing the Secretary of State in Council in a civil contract in any case in which he could have similarly sued the East India Company." The impugned Burma Act was held *ultra vires*. The purpose of the 1858 Act was not indiscriminate adoption of the archaic common law rule of immunity but to adopt it in a refined shape, for the preamble to the Act itself says that it is "An Act for the better Government of India".

II. Judicial Decisions.—That being so the cases which have adjudicated and established the liability of the East India Company in contract, must be taken as part of substantive law on the question. Before we come to actual decisions it would not be out of place to remember that under English law (till Crown Proceedings Act, 1947) subject could get relief only through Petition of Right (*Macbeath v. Haldimand*¹—supra). In India the said English Company which since 1600 A.D. had purely commercial character and thereby its liability under and head of action was equal to that of a private person, acquired dual character in 1765 with the grant of Diwani by Shah Alam.⁶ Acts done by East India Company or its officers began to be divided into those done as a commercial undertaking, and those done

5. (1912-13) L.R. 40 I.A., 48 at p. 52 : 24 M.L.J. 459 (P.C.).

6. For details see Rankin, C.J.'s Judgment in *Secretary of State v. Srigobinda*, (1932) 36 C.W.N. 606,

in pursuance to authority as Diwan of the Moughal Emperor. But the earliest judicial authority which granted exemption to the Government in respect of acts of the later class was an observation of Peacock, C J., in the *P. & O. case*⁶ a, viz.,

"Where an act is done or a contract entered into in the exercise of powers usually called sovereign powers by which we mean powers which can not be lawfully exercised except by a sovereign or a private individual delegated by a sovereign to exercise them, no action will lie."

This observation was entirely agreed to and purported to be followed by the Calcutta High Court in the single case of *Nobin Chunder Dey vs The Secretary of State*⁷. The facts were: Under certain regulation the licence for sale of ganja was to be given to highest bidder at the auction to be conducted by a Government department. The highest bidder had to deposit certain licence fee before licence could be issued. The plaintiff who was the highest bidder deposited the requisite fee but subsequently the Government refused (and there was no question of revocation of the licence which is a quasi-judicial act and is thus justiciable) at all to grant the licence or even to return the said deposit fee. The plaintiff sued for 'breach of contract'. Both in the lower Court as well as in the High Court the action failed for complete reliance placed upon the observations of Sir Peacock, C J., in the *P. & O. case*⁸ a. Garth C J who delivered the judgment of the Court concurred with Phear, J.

'The Government was no doubt rightly advised to meet this suit in every possible way but I should suppose that if the facts of the case are such as they have been made to appear to me by the evidence the plaintiff would recover back his deposit money on making a proper petition for that purpose to the Government of India—a petition which if not strictly speaking a petition of right, would be of the nature of a petition of right'.

This to my knowledge is the solitary instance where any Court has gone so far in making even observation in this connection. But even this observation is not an authority for the view that in cases where the Government has committed a breach of contract the remedy is by way of Petition of Right. Because—firstly the decision is based upon the dicta of Sir Peacock C J., in *P. & O. case*⁸ a which was a case of tort committed in pursuance to commercial business and the Government was held liable in that case. Secondly, even if the dicta in the *P. & O. case*⁸ a is taken as correct statement of the law the matter does not go too far. For in *Nobin Chunder's case*⁷ there was no question of any breach of contract—indeed there was no contract at all. Phear, J., therefore stated, "I am also of opinion that the evidence in this case fails to establish any such contract on the part of the Government as that upon which the plaintiff relies". Thirdly if not contract what it then was? It was an act done in pursuance to licensing power of the State—a power which is an attribute of all sovereign States to regulate private business for collective social good. In the same case Garth C J., frankly accepted this view.

'Now it is impossible to doubt for a moment that the laws which are made in this or any other country for the taxation of the subject by the imposition of customs and duties are laws which can only be made or enforced in the exercise of sovereign powers properly so called and these sales, at which

6-a (1861) 5 Bom.H.C.R. (App.) 1

7 (1875) 1 L.R. 1 Cal 11

8 *Ibid.*, p 20

9 *Ibid.*, p 17

the plaintiff contends that he purchased the rights on which he claims, only constitute a portion of the machinery and arrangements by which the imposition and collection of the Excise duties are regulated in this country. His claim is therefore clearly one of those which cannot be enforced against the Government of India¹⁰. In this respect *Nobin Chunder's case*⁷ is rather benevolent for having at least suggested for a remedy similar to Petition of Right even for wrongs done in exercise of sovereign powers.

Fourthly, on the other hand the proposition that contractual liability of the Government being a specie of non-sovereign act—is equal to that of an ordinary individual is warranted by decisions both prior and after the passing of the Government of India Act, 1858.

In *Dhack Jee vs. E. I. Co.*¹¹ in 1843 Sir Erskine Perry said that during 240 years of the existence of the company that company was entitled to immunity only in cases of political nature.

*Moodalay vs. The East India Company*¹², is a case directly on the point. There the company had entered into a contract with the plaintiff and had committed breach thereof and pleaded immunity from action equal to one accorded to Crown. This plea was rigidly excluded:

"It hath been said that the East India Company have a sovereign power; be it so; but they may contract in a civil capacity; it cannot be denied that in a civil capacity they may be sued: in the case now before the Court, they entered into a private contract; if they break their contract, they are liable to answer for it."

*Bank of Bengal vs. East India Company*¹³ is another instance where contract of agency was involved. A servant of the company during the course of employment wrongfully acted; thereby the company was benefited. In a suit to recover the unjust benefit so accrued the company pleaded immunity. Again this suggestion was dispelled and the company was held liable for restitution as under the ordinary law of contract. It was observed that "the fact of the company having been invested with powers usually called sovereign powers did not constitute them sovereign."

Judicial decisions after passing of the Government of India Act, 1858 have substantiated the rule so established. Thus in *Forrester vs. Secretary of State*¹⁴, the plaintiffs were successors of a jagirdar who was under a sovereign and had purchased certain arms for himself. Upon the conquest by the company of the territory, the arms of the Jagirdar were also seized although the Jagirdar remained in the same position under the Company administration. The plaintiff sued to recover territory as well as damages for seizure of arms. The Judicial Committee held that territory was taken from the Ruler under the Act of State which was not questionable. But their Lordships allowed the appeal so far as the "arms suit" was concerned by inferring an 'implied contract' to pay the value of arms so seized together with interest at the rate of 12% p.a. and remitted the case to India for disposal and decree accordingly.

10. *Ibid*, p. 27.

11. 2 *Morley's Digest* 307 (329-30) cited by V *Law Commission XIV Report*.

12. (1785) 1 *Bro.C.C.* 469.

13. (1831) *Bignell Rep.* 120.

14. (1874) 12 *Beng.L.R.* 120 (P.C.) pp. 166-167.

Again in *Kishen Chand vs The Secretary of State*¹⁵, the Government entered into a contract to grant a lease to the plaintiff. The plaintiff failed to comply certain formalities whereupon the Government granted the same lease to another person and in an action, the Government took the defence of immunity. Chief Justice Stuart at p. 836 said:

"And if it (contract) could be enforced by the Government against Kishen Chand, why could it not be equally enforced by him against them (Government) if necessary?" With regard to the applicability of Petition of Right his Lordship observed¹⁶.

"A careful examination of the Act of Parliament amending the law relating to such petitions 23 & 24 Vict., c 34 will show that proceedings against the Crown in England even where, there is a legitimate case for the remedy, have in effect reduced the procedure from the elevation of prerogative to that of ordinary right as between subject and subject ...and procedure identical with that of an ordinary action at law."

The suit however failed for the plaintiff himself could not comply with the conditions.

Another landmark in the history of States' contractual liability is the Full Bench decision of Madras High Court in *Vijaya Ragava vs The Secretary of State*¹⁷. A municipal statute empowered the Governor in Council to terminate the contract of service and to dismiss an employee on grounds of misconduct. The plaintiff a municipal commissioner was removed from service and no grounds were given at all for such action. He brought an action for wrongful breach of service-contract and the defendant pleaded sovereign immunity. The Court accepting the line of thinking propounded in *Hari Bhanji's case*¹⁸-a awarded damages against the Government. As to contractual immunity it was said "The Governor in Council removed the plaintiff, professing to act under the municipal law, and not under a sovereign right outside that law"¹⁹. Muttuswami Ayyar, J., who had the privilege of taking part in *Hari Bhanji's case*²⁰-a again substantiated his earlier view in this case also:²¹

"A careful examination of the Act of Parliament amending the Law relating to such petitions 23 & 24 Vict., c 34, will show that proceedings against the Crown in England, even where there is a legitimate case for the remedy, have in Her Majesty's Courts, and according to law as it stands at present, the Secretary of State is liable to be sued in those cases in which the late East India Company might be sued."

Besides these cases, the subsequent cases also at many places took the above position as settled. Thus in *Shivabhanjan v. Secretary of State*²² a case on tort committed in pursuance to statutory duty and where damages were not awarded, the above position in contract was supported. Referring to section 65 by virtue of which the Secretary of State was to succeed the E.I. Company's liabilities, etc; Jenkins, C.J. citing *P. & O. case*²³-a says the Secretary of State was to succeed to

15. (1881) I L.R. 3 All. 829.

16. I L.R. 3 All. 829 at pp. 836-837.

17. (1884) I L.R. 7 Mad. 466 (F.B.).

17-a. (1882) I L.R. 5 Mad. 273.

18. Per Kerran, J. at p. 472.

19. At p. 478.

20. (1904) 6 Bom.L.R. 65.

debts and liabilities lawfully incurred or contracted.²¹ In *Ross v. Secretary of State*²² though the plaintiff could not get damages for illegal execution of statutory duty by a Government officer, yet it was observed that the action otherwise would have been maintainable. Wallis, J., said, "that he did not agree that no suit would lie against the Government except in connection with a private undertaking." Among the cases under the Government of India Act, 1935 two Privy Council decisions²³, *Rangachari v. Secretary of State* and *Venkata Rao v. Secretary of State* finally established the rule that in India in cases of contract a subject as of right under ordinary law can 'sue' the Government without recourse to Petition of Right. Lord Roche who decided both these cases relating to service contracts answered the question as to whether such action against the Government was well-founded as follows: "The answer to the first question seems to their Lordships plainly to be in the affirmative".²⁴ His Lordship goes even a step further,²⁵

"Breach of contract by the Crown can in England be raised by petition of right. The fact that for a different reason namely, that service under the East India Company was at pleasure—a precisely similar suit could not have been brought against the company does not in their Lordships' view conclude the matter either under clause 2, section 32 of the Act, (1919) or on the reasoning of Sir Barnes Peacock in *P. & O. case*-a." Therefore the Board concluded.

"their Lordships are not prepared to say that remedy by suit against the Secretary of State in Council for a breach of the Contract of service would not have been available to the plaintiff."

Right to redress against Government in breaches of Contract was held to be an established rule based on State morality in *Ram Gulam v. U. P. Government*¹ where damages were not awarded, for the action itself had no indicia of any contract. But the suggestion of Sovereign immunity in contracts was brushed aside by Seth, J.¹ "In England these limits are defined of the scope of 'the Petition of Right' and in India by the Constitution Act of 1935²".

Lastly among the post-constitution decisions *P. C. Biswas v. Union of India*³ is a case directly on the point. The plaintiff entered into a contract for the supply of lime for a Government stone quarry, which came to an abrupt end for non-compliance of the terms on the part of the Government. Allowing the appeal suit, Ram Labhaya, J. referring to constitutional provisions under Articles 299, 300 reiterated the established view as follows⁴:

"It follows, therefore, that subject to statutory conditions or limits the contractual liability of the State under the Constitution is not only enforceable but it is the same as that of any individual under the ordinary law of contract. No position of privilege has been given to the Government in respect of its contractual liabilities. It stands on the same footing as any other individual."

21. *Ibid* at p. 68.

22. 24 M.L.J. 429 : (1914) I.L.R. 37 Mad. 55.

23. Both in L.R. 64 I.A. 40 : I.L.R. (1937) Mad. 517 : (1937) 1 M.L.J. 515 : A.I.R. 1937 P.C. p. 27 and L.R. 64 I.A. 55 : I.L.R. (1937) Mad. 532 : (1937) 1 M.L.J. 529 : A.I.R. 1937 P.C. p. 31 respectively.

24. P. 29 (first case).

25. At p. 35.

1. A.I.R. 1950 All. 206 at p. 207.

2. Section 175 equal to Article 300.

3. A.I.R. 1956 Assam 85.

4. At p. 90.

Conclusions —1 Constitution Acts have determined the liability of the Government in contracts equal to that of East India Company shorn of archaic English remedy by way of Petition of Right

2 The Judicial decisions which have authoritatively adjudicated the extent of contractual liability of the East India Company are uniform upon the point that in Contracts its liability was similar to that of an ordinary individual under the law of contract since contract is an important specie of non Sovereign activity The same is the position of the Government too

3 The only limits within which Government can enter into a contract is that it should not result into a fraud on the Constitution namely contract should not be inconsistent to plenary power of legislature or derogatory to constitutional operation of the State machinery

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—A. K. SARKAR, *Chief Justice*, J. R. MUDHOLKAR AND R. S. BACHAWAT, JJ.

Nalinikant Ambalal Mody

.. Appellant*

v.

S. A. L. Narayan Row, Commissioner of Income-tax, Bombay
City-1, Bombay

.. Respondent.

Income-tax Act (XI of 1922), sections 3, 4, 6 and 12—Heads of income—Mutually exclusive—Income assessable under one head—Not to be assessed as falling under the residuary head “other sources”—Nature of income—Time of receipt or manner of treatment by assessee—Immaterial—Assessee, Advocate appointed a Judge—Adopting cash basis of accounting and calendar year—Professional services rendered in practice as Advocate—Receipt of professional fees after discontinuance of profession and after the close of the accounting year, of the year of discontinuance—Income from profession—Not to be assessed under the residuary head as income from “other sources”—Receipt, not taxable.

Words and Phrases—“Total income”—“If not included under any of the preceding heads.”

The assessee was practising as an Advocate till 1st March, 1957, when he was appointed as a Judge of the High Court. His method of accounting was cash and his accounting year was the calendar year. For the assessment years 1959-60 and 1960-61 the assessee claimed that the sums received by him, during the calendar years 1958 and 1959, on account of the professional work done by him before 1st March, 1957, should be excluded from his assessable income. On the rejection of the claim by the Income-tax Officer and by the Commissioner in the revision preferred under section 33-A of the Act the assessee appealed to the Supreme Court by Special Leave.

Held (by majority), that the receipts were not chargeable to tax either under the head of professional income or under the residuary head “other sources”.

The heads of income under the Act are mutually exclusive and if the receipt of income can be brought under one head, it cannot be brought under the residuary head enacted in section 12 of the Act.

Whether an income falls under one head or another has to be decided according to the common notions of practical men, and not by reference to an assessee's treatment of income. The Act does not provide any guidance in the matter.

If the income was the fruit of professional activity, it has to be brought under the head of business income irrespective of the time when it was received. There is neither authority nor principle for the proposition that an income arising from a particular head ceases to arise from that head because it is received at a certain time. The time of the receipt of the income has nothing to do with the question under which particular head of income it should be assessed.

Section 3 of the Act does not provide that the entire total income shall be chargeable to tax. The chargeability has to be in accordance with and subject to the provisions of the Act and the income has to be brought under one of the heads in section 6 and income can be charged to tax only if it is so chargeable under the computing section corresponding to that head. If the income cannot be so brought to tax, it will escape taxation even if it be included in the total income under section 4 of the Act.

Furthermore the expression, “total income” in section 3 has to be understood as it is defined in section 2 (15) under which it means “total amount of income, profits and gains referred to in subsection (1) of section 4 computed in the manner laid down in this Act”, that is computed for the purpose of chargeability under one of the sections from section 7 to section 12-B.

Section 12 deals with income which is not included under any of the other preceding heads. If the income is so included, it cannot come under section 12. The words in the section “if not included under any of the preceding heads” which refer to the heads considered in sections 7 to 10—refer to income and not to head of income.

Bachawat, J. (dissenting): On the construction of the Act, the professional income of an assessee whose accounts were kept on a cash basis received by him during his lifetime after the discontinuance of his profession and after the close of the accounting year in which the profession was discontinued, is assessable to tax under section 13 of the Act.

Section 10 on its proper construction applies only to the profits and gains of profession carried on by the assessee during any part of the previous year. The profits and gains of the profession not carried on by the assessee during any part of the previous year being outside the purview of section 10 must necessarily fall under section 12 of the Act.

Appeals by Special Leave from the Judgment and Order, dated the 29th January, 1963, of the Commissioner of Income tax, Bombay City-1, in No I/RP/BBY/40 and 41 of 1961

N A Palkhivala, Senior Advocate (*T A Ramachandran* and *S P Mehta*, Advocates, and *O C Mathur*, Advocate, of *M/s J B Dadacharji & Co*, with him), for Appellant

Sarjoo Prasad, Senior Advocate (*R Ganapathy Iyer* and *R N Sachithy*, Advocates, with him), for Respondent

The Court delivered the following Judgments

Sarkar, C.J (for himself and *Mudholkar, J*)—The assessee was an Advocate of the High Court of Bombay and was practising his profession there till 1st March, 1957, when he was elevated to the Bench of that Court. He then ceased to carry on his profession and has not resumed it since. As an Advocate he had been assessed to income tax on his professional income, his accounting years for the assessments being the calendar years. When he was raised to the Bench, various fees for professional work done by him were outstanding. In the years 1958 and 1959 during no part of which he had carried on any profession, he received certain moneys on account of these outstanding fees. His accounts had always been kept on the cash basis. The question is whether he is liable to pay income tax on these receipts.

We shall first make a few general observations. Section 6 of the Income tax Act, 1922, specifies six sources or heads of income which are chargeable to tax. In order to be chargeable, an income has to be brought under one of these six heads. Section 6 also provides that the chargeability to tax shall be in the manner provided in sections 7 to 12 B of the Act. Each of these sections lays down the rules for computing income for the purpose of chargeability to tax under one or other of the heads mentioned in section 6. An income falling under any head can only be charged to tax if it is so chargeable under the corresponding computing section. The fourth head of income in section 6 is "Profits and gains of business, profession or vocation" and the fifth head "income from other sources". The fifth head is the residuary head embracing all sources of income other than those specifically mentioned in the section under the other heads. Then we observe that the several heads of income mentioned in section 6 are mutually exclusive, a particular income can come only under one of them. *The United Commercial Bank v The Commissioner of Income tax*¹

We now turn to the present case. The receipts in the present case are the outstanding dues of professional work done. They were clearly the fruits of the assessee's professional activity. They were the profits and gains of a profession. They would fall under the fourth head, viz., "Profits and gains of business, profession or vocation". They were not however chargeable to tax under that head because under the corresponding computing section, that is, section 10, an income received by an assessee who kept his accounts on the cash basis in an accounting year in which the profession had not been carried on at all is not chargeable and the income in the present case was so received. This is reasonably clear and not in dispute. see *Commissioner of Income tax v Express Newspapers Ltd*²

Can the receipts then be income falling under the residuary head of income and charged to tax as such? The Commissioner of Income tax from whose decision the present appeal has been taken by the assessee, held that it was chargeable under that head. He came to that conclusion on what he thought were the general principles and also on the authority of a certain observation of Chagla, J, in *Re B M Kamdar*³. The observation of Chagla J does not seem to us to be of much assistance for the decision in that case was not based on it nor is it supported by reasons. We find ourselves unable to agree with the learned Judge. We may add that apart from the observation in *Kamdar's case*³, there does not appear to be any direct authority supporting the view of the Commissioner.

¹ (1958) S.C.J. 46 (1958) I.M.L.J. (S.C.) 26

1958) 1 An.W.R. (S.C.) 26 (1958) S.C.R. 79

² (1964) 2 I.T.J. 221 (1964) 2 S.C.J. 405

(1964) 8 S.C.R. 188

3 1 I.L.R. (1946) Bom. 8 47 Bom.L.R. 742

AIR 1945 Bom. 442

As to the general principles, we first observe that as the heads of income are mutually exclusive, if the receipts can be brought under the fourth head, they cannot be brought under the residuary head. It is said by the Revenue that as the receipts cannot be brought to tax under the fourth head they cannot fall under that head and must therefore fall under the residuary head. This argument assumes, in our view without justification, that an income falling under one head has to be put under another head if it is not chargeable under the computing section corresponding to the former head. If the contention of the Revenue is right, the position would appear to be that professional income of an assessee who keeps his account on the cash basis would fall under the fourth head if it was received in a year in which the profession was being carried on, but it would take a different character and fall under the residuary head if received in a year in which the profession was not being carried on. We are unable to agree that this is a natural reading of the provisions regarding the heads of income in the Act. Whether an income falls under one head or another has to be decided according to the common notions of practical men for the Act does not provide any guidance in the matter. The question under which head an income comes cannot depend on when it was received. If it was the fruit of professional activity, it has always, to be brought under the fourth head irrespective of the time when it was received. There is neither authority nor principle for the proposition that an income arising from a particular head ceases to arise from that head because it is received at a certain time. The time of the receipt of the income has nothing to do with the question under which particular head of income it should be assessed.

It is then said that the receipts had to be included in the total income stated in section 4 and since they do not fall under the exceptions mentioned in that section, they must be liable to tax and, therefore, they must be considered as income under the residuary head as they could not otherwise be brought to tax. The contention seems to us to be ill-founded. While it is true that under section 4 the receipts are liable to be included in the total income and they do not come under any of the exceptions, the contention is based on the assumption that whatever is included in total income under section 4 must be liable to tax. We find no warranty for this assumption. Section 4 does not say that whatever is included in total income must be brought to tax. It does not refer at all to chargeability to tax. Section 3 states, that ;

"Taxshall be charged.....in accordance with, and subject to the provisions, of this Act in respect of the total income."

This section does not, in our opinion, provide that the entire total income shall be chargeable to tax. It says that the chargeability of an income to tax has to be in accordance with and subject to the provisions of the Act. The income has therefore to be brought under one of the heads in section 6 and can be charged to tax only if it is so chargeable under the computing section corresponding to that head. Income which comes under the fourth head, that is, professional income, can be brought to tax only if it can be so done under the rules of computation laid down in section 10. If it cannot be so brought to tax it will escape taxation even if it be included in total income under section 4. Furthermore, the expression "total income" in section 3 has to be understood as it is defined in section 2 (15). Under that definition, total income means "total amount of income, profits and gains referred to in sub-section (1) of section 4 computed in the manner laid down in this Act", that is, computed for the purpose of chargeability under one of the sections from section 7 to section 12-B. The receipts in this present case, as we have shown, can only be computed for chargeability to tax, if at all, under section 10 as income under the fourth head. If they cannot be brought to tax by computation under that section, they would not be included in "total income" as that word is understood in the Act for the purpose of chargeability. That all income included in total income is not chargeable to tax may be illustrated by referring to income from the source mentioned in the third head in section 6, namely, "Income from property." The corresponding computing section is section 9 which says that tax shall be payable on income under this head in respect of *bona fide* annual value of property. It is conceivable that income actually received from the property in a year may exceed the notional figure. The excess

would certainly be liable to be included in total income under section 4. It however cannot be brought to tax as income under the head "other sources" see *Salisbury House Estate, Ltd v Fry*¹. It is an income which cannot be taxed at all though it is included in total income as defined in section 4.

In *Probhat Chandra Barua v King Emperor*², it was no doubt said that section 12 which is the computing section in respect of the residuary head of income, was clear and emphatic and expressly framed so as to make the head of "other sources" describe a true residuary group embracing within it all sources of income, profits and gains, provided the Act applies to them, that is, provided they are liable to be included in total income under section 4 which deals with income to which the Act applies. We are in full agreement with that observation but we do not think that it affords any support to the contention that all income liable to be included within total income under section 4 must be brought to tax. The observation must be read keeping in mind the undisputed principle that a source of income cannot be brought under the residuary head if it comes under any of the specific heads, for the Judicial Committee could not have overlooked that principle. If we do that, it will be clear that all that the Judicial Committee said was that all sources of income which do not come under any of the other heads of income can be brought under the residuary head. The words used are 'embracing all sources of income' and not all income. It did not say that an income liable to be included in the total income is chargeable to tax as income under the residuary head if it is not chargeable under a specific head under which it normally falls. In *Probhat Chandra Barua's case*³, the Judicial Committee was not concerned with that aspect of the matter, the only question before it was whether zamindari and certain other income fell under the third head of income from property, as the word "property" was understood in the Act.

Another aspect of *Probhat Chandra Barua's case*³, requires a mention. The question that there arose, as we have just now said, was, whether the Income tax Act did not impose a tax on the income of a zamindar derived from his zamindari and certain other properties. It was said on behalf of the assessee that the zamindari and the other income being income from property fell under the third head and could be brought to tax only under the corresponding computing section, section 9. It was pointed out that the income could be charged to tax under that section because it dealt only with income from house property which the income concerned was not. It was then said that the income could not be taxed under the residuary head because it was really income from property and could be taxed only as such. The Judicial Committee did not accept this contention. It took the view that the word "property" in the third head "Income from property" had to be interpreted as restricted only to that kind of property which is described in the computing section, section 9 and as that section deals only with house property the income from zamindari and other properties did not fall under the head "Income from property". It, therefore, found no difficulty in holding that the Zamindari income was income from the residuary source. We find no support in this case for the view that an income which is admittedly under a specific head can be brought to tax under the residuary head if it cannot be so brought under the computing section corresponding to that head. That case only held that zamindari income was not income which fell under the head "Income from property" and that it could never so fall. It provides no warranty for the contention that an income from one source may, in certain circumstances be treated as income from a different source, which is the contention of the Revenue in the present case.

We think it right also to observe that if the receipts in the present case could be treated as income from the residuary source, the position would be most anomalous. We have earlier said that if that were so, the placing of an income under this head would depend on the act of the assessee, it would depend on the time when the assessee

chose to receive it. That we conceive is not a situation which the Act contemplates. But there is another and stronger reason to show that the Act did not contemplate it. Suppose the assessee had kept his accounts on the mercantile basis. He would then have been charged to tax on these receipts in the year when the income accrued which must have been a year when he was carrying on his profession as an Advocate. It could not then have been said that the receipts should be taken under the head "other sources." If we are to accept the contention of the Revenue, we have to hold that the method of book-keeping followed by an assessee would decide under which head a particular income will go. If the Revenue is right, the income of the assessee would go under the fourth head if the method of accounting was mercantile and it would go under the fifth head if the accounting was the cash basis. We are wholly unable to take the view that such can be the position under the Act. The heads of income must be decided from the nature of the income by applying practical notions and not by reference to an assessee's treatment of income: see *Commissioner of Income-tax v. Cocanada Radhaswami Bank Ltd.*¹.

It now remains to see whether section 12 justifies a view contrary to that which we have taken. It lays down the rules for computation of income under the head "other sources." It says that tax under the head "income from other sources" shall be payable in respect of income of every kind which may be included in the total income if not included under any of the preceding heads. It seems to us clear that the words "if not included under any of the preceding heads"—which refer to the heads considered in sections 7 to 10—refer to income and not to a head of income. Section 12, therefore, deals with income which is not included under any of the preceding heads. If the income is so included, it falls outside section 12. Whether an income is included under any of the preceding heads would depend on what kind of income it was. It follows that if the income is profits and gains of profession, it cannot come under section 12. Section 12 does not say that an income which escapes taxation under a preceding head will be computed under it for chargeability to tax. It only says—and this is most important—that an income shall be chargeable to tax under the head "other sources" if it does not come under any other head of income mentioned in the Act. Section 12 therefore does not assist the contention of the Revenue that professional income which cannot be brought to tax under section 10 may be so brought under section 12.

For these reasons we have come to the conclusion that the receipts were not chargeable to tax either under the head of professional income or under the residuary head. It was not said that the receipts might be brought to tax under any other head. In our opinion, therefore, the receipts were not chargeable to tax at all.

We accordingly allow these appeals with costs.

Bachawat, J.—These appeals raise the question whether the professional income of an assessee whose accounts are kept on a cash basis, received by him during his lifetime after the discontinuance of the profession and after the close of the accounting year in which the profession is discontinued, is assessable to income-tax either under section 10 or under section 12 of the Indian Income-tax Act, 1922.

The assessee was practising as an Advocate in the High Court of Bombay till 1st March, 1957, when he was appointed a Judge of the High Court at Bombay. His method of accounting was cash, and his accounting year was the calendar year. The relevant orders of the Income-tax Officer suggest that his accounting year was the financial year ending on 31st March, but it is now the common case of both the assessee and the Revenue that the accounting year was the calendar year.

In the assessment year, 1958-59, the assessee was assessed to income-tax in respect of the entire professional income received by him during the calendar year including the income received after 1st March, 1957. It is not disputed that the assessee was

1. (1965) 2 I.T.J. 346 : (1965) 2 Comp.L.J. An.W.R. (S.C.) 36 : (1965) 2 S.C.J. 489.
120 : (1965) 2 M.L.J. (S.C.) 36 : (1965) 2

liable to pay tax in respect of the income received by him between 1st March, 1957, and 31st December, 1957

During the calendar years, 1958 and 1959, the assessee received the sums of Rs 30,570 and Rs 15,240 respectively on account of professional fees for work done by him before 1st March, 1957. In the returns for the assessment years, 1959-60 and 1960-61, the assessee included the aforesaid two sums as his income from profession. By his orders, dated 30th May, 1960, and 26th October, 1960, the Income-tax Officer subjected the aforesaid two sums to tax treating them as receipts of fees for professional services rendered in the earlier years and as part of the total income of the assessee. On 4th April, 1961, the assessee filed two revision petitions before the Commissioner of Income tax, Bombay City I, under section 33 A contending that the aforesaid two sums were no part of his total income of the relevant accounting years and were included in his returns through an error and asking for their exclusion from his assessable income for the relevant assessment years. By a common order, dated 29th January, 1963, the Commissioner of Income tax held that the two sums were assessable on general principles and also on the authority of the decision in *Re B M Kamdar*¹, and rejected the revision petitions. From this order, the assessee now appeals to this Court by Special Leave.

The first question is whether the two sums were assessable to tax under section 10 of the Indian Income tax Act, 1922. Section 10 (1) provides

* The tax shall be payable by an assessee under the head Profits and gains of business profession or vocation in respect of the profits and gains of any business profession or vocation carried on by him."

Section 10 applies to the profits and gains of any business, profession or vocation carried on by the assessee. Considering that the subject matter of charge is income of the previous year, the expression "carried on by him" must mean "carried on by him at any time during the previous year". To attract section 10 (1), it is not essential that the assessee should have carried on the profession throughout the entire previous year, or at the time when he realised the outstanding professional fees, it is sufficient that he carried on the profession at any time during the accounting year in which he realised his fees. See *Re Kamdar*¹. On the other hand, the section does not apply to the profits and gains of any profession which was not carried on by the assessee at any time during the previous year.

Our attention was drawn to several decisions of this Court dealing with section 10 (2) (viii) and the second proviso to section 10 (2) (vii). In *Commissioner of Income tax v. Express Newspapers Ltd*² and *Commissioner of Income tax v. Ajax Products Ltd*³, this Court held that one of the essential conditions of the applicability of the second proviso to section 10 (2) (vii) is that during the entire previous year or a part of it the business shall have been carried on by the assessee. In the *Express Newspapers Ltd*'s case² at page 259, Sudha Rao, J. said

"Under section 10 (1) as we have already pointed out the necessary condition for the application of the section is that the assessee should have carried on the business for some part of the accounting year."

These observations support the conclusion that the profits and gains of a business or profession are not chargeable under section 10 (1), if the assessee did not carry on the business or profession during any part of the previous year.

In the instant case, the assessee discontinued his profession as soon as he became a Judge of the Bombay High Court. He could not carry on the profession after he became a Judge. It is not possible to hold that he continued to carry on the profession merely because he continued to realise his outstanding fees. It follows that the assessee did not carry on his profession as an Advocate at any time during the calendar years, 1958 and 1959. The receipts of the outstanding professional fees

1 1 L.R. (1946) Bom. 8 47 Bom.L.R. 742 (1964) 8 S.C.R. 183
A.I.R. 1945 Bom. 442.

2 (1964) 2 I.T.J. 221 (1964) 2 S.C.J. 405 3 (1965) 1 I.T.J. 623 (1965) 1 S.C.J. 659

during 1958 and 1959 were not profits and gains of a profession carried on by the assessee during those years, and were not assessable to tax under section 10 (1).

Section 13 provides that except where the proviso to that section is applicable, the income for the purpose of section 10 must be computed in accordance with the method of accounting regularly employed by the assessee. Section 13 is mandatory. In the instant case, as the assessee employed the cash method of accounting and as the proviso to section 13 did not apply, his professional income during 1957 and the previous accounting years had to be computed on the cash basis. The Revenue had no option in the matter. Had the assessee adopted the mercantile method of accounting the entire income of the assessee arising from his profession before 1st March, 1957, would have been included in his assessable income for those years, and no portion of it would have escaped assessment under section 10. But as the assessee adopted the cash method of accounting, the outstanding fees could not be included in the assessment for those years. The question is whether this income now escapes taxation altogether. There is no doubt that by the method of accounting employed by the assessee, he has chosen to treat the receipts in question as income of the accounting years, 1958 and 1959.

The Revenue claims that the income was assessable to tax under section 12. On behalf of the assessee, Mr. Palkhivala submitted that (1) the income from the defunct source of profession, though not assessable under section 10, continued to fall under the head covered by section 10 and the residuary head under section 12 was not attracted, (2) section 10 covers residual heads and not residual receipts, and (3) that if section 12 were applied to this income, the assessee would suffer in-justice because the deductions properly allowable under section 10 in respect of the income could not be allowed. On the other hand, Mr. Sarjoo Prasad appearing on behalf of the Revenue submitted that the receipts in question were part of the total income of the assessee for the relevant accounting years chargeable under section 3 read with sections 2 (15) and 4, and as the income was not exempt from tax and as it did not fall under section 10 or any other head, it must be assessed to tax under section 12. In support of his contention, Mr. Sarjoo Prasad relied upon the opinion of Chagla, J. in *Re Kamdar*¹, at page 58.

By section 3 read with sections 2 (15) and 4, income-tax is charged for every year in accordance with and subject to the provisions of the Act in respect of the total income of any previous year of the assessee computed in the manner laid down in the Act, including all income, profits and gains from whatever source derived, which accrue or arise or are received or are deemed to accrue, arise or to be received as provided by section 4 (1) and which are not exempted under section 4 (3). The crucial words in section 4 are "from whatever source derived." The nature of the source does not affect the chargeability of the income. Section 6 sets out the heads of income chargeable to tax. The several heads are dealt with specifically in sections 7, 8, 9, 10 and 12. Income is classified under different heads for the purpose of computing the net income under each head after making suitable deductions. Income, profits and gains from whatever source derived, included in the total income fall under one head or the other. If any part of the total income does not fall under the specific heads under sections 7, 8, 9 and 10, it must fall under the residuary head under section 12. Section 12 (1) provides.

"The tax shall be payable by an assessee under the head 'Income from other sources' in respect of income, profits and gains of every kind which may be included in his total income (if not included under any of the preceding heads)."

Income, profits and gains of every kind are covered by section 12, provided two conditions are satisfied, viz., (1) they are not included under any of the preceding heads and (2) they may be included in the total income of an assessee. Any income chargeable under a specific head can be charged only under that head, and no part of that income can be charged again under section 12. But any part of the total income of the assessee not assessable under a specific head is assessable under the

residuary head covered by section 12. Referring to similar words in section 12 (1), as it stood before its amendment in 1939, Lord Russell observed in *Prokhat Chandra Barua v The King Emperor*¹ —

"These words appear to their Lordships clear and emphatic and expressly framed so as to make the sixth head mentioned in section 6 describe a true residuary group embracing within it all the sources of income profits and gains provided the Act applies to them i.e. provided that they accrue or arise or are received in British India or are deemed to accrue or arise or to be received in British India, as provided by section 4 sub-section (1) and are not exempted by virtue of section 4 sub-section (3)

Referring to the words "income, profits and gains" in section 12, Lord Russell, said in *Gopal Saran Naram Singh v Income tax Commissioner*²

"The word 'income' is not limited by the words profits and gains. Anything which can properly be described as income is taxable under the Act unless specially exempted

And Sarkar, J., said in *Sultan Brothers v Commissioner of Income tax*³

Section 12 is the residuary section covering income profits and gains of every kind not assessable under any of the heads specified earlier

Section 6 gives the short label of each head, but the actual contents of the several heads are to be found in sections 7, 8, 9, 10 and 12. Take the head (iii) "Income from property" in section 6. Section 9 shows that only income from buildings or lands appurtenant thereto, of which the assessee is the owner, falls under this head. Income from other properties, e.g., land not appurtenant to a building is outside the purview of this head and falls under section 12. Again, take the head (iv) "Profits and gains of business, profession or vocation". Section 10 on its proper construction applies only to the profits and gains of a business, profession or vocation carried on by the assessee during any part of the previous year. Profits and gains of business, profession or vocation of the assessee which was not carried on by him during any part of the previous year being outside the purview of section 10 must necessarily fall under section 12.

Mr Palkhivala conceded that the receipts in question were the income of the assessee. He also admitted that the income was not exempt from tax under sub-section (3) of section 4. The income was received by the assessee in the taxable territories during the relevant previous years. The receipts are, therefore, liable to be included in the total income. We have found that this income cannot be included under section 10. It is common case that it cannot be included under any other head. It follows that the income must fall under the residuary head specified in section 12.

Section 12 dealing with the residuary head is framed in general terms and in computing the income under this head, requires, deduction of any expenditure (not being in the nature of capital expenditure) incurred solely for the purpose of making or earning such income. As the income in the present case falls under section 12, the allowance for the necessary expenditure must necessarily be given under this head and not under section 10. There is no question of the assessee suffering an injustice by not being given the allowances under section 10. He cannot be given the allowance under section 10, as the income does not fall under that section.

Counsel rightly submitted that section 12 covers residual heads and not residual receipts. In this connection, he relied upon *Salisbury House Estates Ltd v Fry*⁴. That case decided that the various Schedules of the English Income tax Act, 1918 are mutually exclusive, Schedule A must be applied to the class of income falling under it and no part of this income is chargeable under Schedule D. This decision received the approval of this Court in *United Commercial Bank Ltd v The Commissioner of Income tax*⁵. On the principle of this decision, if a particular income is

1 (1930) L.R. 57 I.A. 228 239 59
M.L.J. 814

2 (1935) L.R. 62 I.A. 207, 213 69 M.L.J.
190

3 (1964) 1 I.T.J. 160 (1964) 1 S.C.J. 232.

4 (1930) 15 T.C. 266

5 (1958) S.C.J. 46 (1958) 1 M.L.J. (S.C.)
26 (1958) 1 A.W.R. (S.C.) 26

taxable as income from property under section 9, any residual receipt from the property in excess of the annual value assessed under section 9 cannot be assessed again as residual income under section 12. This principle has no application to the case before us. The relevant professional income of the assessee is not taxable under section 10 or under any other specific head, and it must, therefore, be taxed under section 12. This is not a case where the Revenue has taxed or can tax the income under section 10 and again seeks to tax the income under section 12.

Mr. Palkhivala next referred us to several English decisions in support of his contention that the receipts of the professional income after the discontinuance of the profession are not assessable to income-tax. Rowlatt, J. in *Bennett v. Ogston*⁴ said :

“When a trader or a follower of a profession or vocation dies or goes out of business—because Mr. Needham is quite right in saying the same observations, apply here—and there remain to be collected sums owing for goods supplied during the existence of the business or for services rendered by the professional man during the course of his life or his business, there is no question of assessing those receipts to income-tax; they are the receipts of the business while it lasted, they are arrears of that business, they represent money which was earned during the life of the business and are taken to be covered by the assessment made during the life of the business, whether that assessment was made on the basis of bookings or on the basis of receipts.”

These observations received the approval of the House of Lords in *Purchase v. Stainer's Executors*² and *Carson v. Cheyney's Executors*³. In the last two cases, the Court held that the professional earnings of a deceased individual realised by his executor were not liable to income-tax either under Case II or under Cases III and VI of Schedule D of the English Income-tax Act, 1918. In *Cheyney's case*³, the professional earner had died in one of the assessment years and part of his earnings had been realised by his executor during the same assessment year. It is remarkable however, that in *Cheyney's case*³ at page 265 Lord Reid said :

“In my opinion, the ground of judgment in this House in *Stainer's case*², was that payments which are the fruit of professional activity are only taxable under Case II and cannot be taxed under Case III, even when it is no longer possible when they fall due to tax them under Case II, and when looked at by themselves and without regard to their source they would fall within Case III. I am not sure that I fully appreciate the reasons for the decision, but I have no doubt that that is what was decided, and I am bound by that decision whether I agree with it or not.”

The rule in *Stainer's case*², rests on shaky foundations and has been subjected to criticism even in England. The rule is subject to exceptions in England, and as pointed out by Jenkins, L.J. in *Stainer's case*², is subject to the application of Rule 18 of the General Rules. The Indian Income-tax Act, 1922 is not *pari materia*; the scheme is in many respects different from the scheme of the English Act, and I think that the rule in *Stainer's case*², is not applicable to the Indian Act. In England, the tax is on the current year's income, the Revenue has the option to assess the income on the accrual basis, and even if it chooses to make an assessment on the cash basis, the entire accrued income might be considered to be covered by the assessment. But under the Indian law, the tax is on the previous year's income, the Revenue has no option to assess the income from a business or profession on the accrual basis if the accounts of the assessee are regularly kept on the cash basis, and the assessment on the cash basis cannot cover the receipts in the subsequent years. Moreover, it is impossible to say under the Indian law that all receipts of outstanding professional fees after the retirement of the assessee from profession escape taxation. Beyond doubt, the receipt of the professional fees in the accounting year during which the assessee carried on the profession is assessable under section 10, though at the time of the receipt he has retired from the profession.

The decision in *Commissioner of Income-tax, Bombay City I, Bombay v. Amarchand N. Shroff*⁴, is entirely distinguishable. In that case, this Court held that the income of a deceased Solicitor received by his heirs subsequent to the previous year in which he died was not liable to be assessed to income-tax under section 24-B as his income in the hands of his heirs, and apart from section 24-B, no assessment

1. (1930) 15 T.C. 374, 378.

2. (1951) 32 T.C. 367.-.

3. (1960) 38 T.C. 240.

4. (1963) 1 S.C.J. 411 : (1963) 1 S.C.R. (Supp.) 699.

can be made in respect of a person after his death. In the instant case the assessee is alive and no question of assessment under section 24-B arises.

Neither side relied on section 25 (1) and in my opinion rightly. That sub-section gives an option to the Revenue to make an assessment in the year of the discontinuance of the business or profession on the basis of the income of the period between the end of the previous year and the date of the discontinuance in addition to the assessment if any made on the basis of the income of the previous year. The sub-section does not preclude the Revenue from making an assessment on the professional income under any other section of the Act.

Our attention was drawn to section 176 (4) of the Income tax Act 1961 which provides

Where any profession is discontinued in any year on account of the cessation of the profession by or the retirement or death of the person carrying on the profession any sum received after the discontinuance shall be deemed to be the income of the recipient and charged to tax accordingly in the year of receipt if such sum would have been included in the total income of the aforesaid person had it been received before such discontinuance.

The note on clause 178 of the Income tax Bill 1961 suggests that this sub-section was passed with a view to give effect to the following recommendations of the Direct Taxes Administration Enquiry Committee in paragraph 781 (11) of its Report

There is no provision in the law at present to assess the income received after the cessation of practice or retirement or death of the assessee carrying on a profession like Solicitors, Advocates, Doctors, Consulting Surveyors, Engineers etc. The law should be amended in such a way that even on the assessee's cessation of his vocation or retirement from the profession or death income received after such cessation, retirement or death would be taxed.

The Report does not purport to have its opinion on any judicial decision. The assumption in this Report that there is no provision in the Indian Income tax Act to assess the entire income received after the retirement or death of professional men cannot be wholly correct because beyond doubt the income received after the retirement in an accounting year during any part of which the assessee practised his profession is assessable under section 10 and the income received after his death by his legal representative during the previous year in which he practised his profession is assessable in the hands of the legal representative under section 24-B. Moreover the Report is silent on the question of the assessment of the outstanding profits of business realised by a trader after the discontinuance of his business. In this case we are concerned with the interpretation of the Indian Income tax Act 1922 and the question is whether we can take into account the provision of the later Act in interpreting the earlier Act. In *Craies on Statute Law* 6th Edn p 146 the law is stated thus

Except as a parliamentary exposition subsequent Acts are not to be relied on as an aid to the construction of prior unambiguous Acts. A later statute may not be referred to to interpret the clear terms of an earlier Act which the later Act does not amend even although both Acts are to be construed as one unless the later Act expressly interprets the earlier Act but if the earlier Act is ambiguous the later Act may throw light on it as where a particular construction of the earlier Act will render the later incorporated Act ineffectual.

This passage is fully supported by the decision of the House of Lords in *Kirkness v John Hudson & Co*¹. In *Hariprasad Shivshankar Shukla v A D Divakar*² this Court gave effect to the plain meaning of an unamended Act though on the interpretation given by it a later amendment would become largely unnecessary and quoted with approval the following passage in the opinion of Lord Atkinson in *Ormond Investment Co Limited v Betts*³. An Act of Parliament does not alter the law by merely betraying an erroneous opinion of it. I do not find any ambiguity in the terms of sections 2 (15) 3 4 6 10 12 and 13 of the Indian Income tax Act 1922 and the later Act cannot be used as an aid to their construction. On the construction of the Indian Income tax Act 1922 I hold that the professional income of an assessee whose accounts were kept on a cash basis received by

1 L.R. (1955) A.C. 696 (1955) 2 A.E.R. 345 3 L.R. (1928) A.C. 143 164
2 (1951) S.C.J. 83 (1957) S.C.R. 121 140

him during his lifetime after the discontinuance of the profession and after the close of the accounting year in which the profession was discontinued, is assessable to income-tax under section 12 of the Act.

In the result, the appeals are dismissed. There will be no order as to costs.

ORDER OF THE COURT.—In accordance with the Judgment of the majority, the appeals are allowed with costs.

V. S.

Appeals allowed.

THE SUPREME COURT OF INDIA.

PRESENT :—K. N. WANCHOO, J. C. SHAK AND S. M. SIKRI, JJ.

His Highness Yeshwant Rao Ghorpade

... *Appellant**

v.

Commissioner of Wealth-tax, Bangalore

... *Respondent.*

Wealth Tax Act, 1957 (Central Act XXVII of 1957), section 4 (1) (a) (iii) and Amendment Act (XLVI of 1964)—Net wealth—Computation—Settlement of shares by assessee on trust—Another charitable trust, beneficiary under the trust for two years thereafter minor child of assessee—Charitable trust beneficiary on the relevant valuation date—Transfer, whether for the benefit of minor child—Benefit, means immediate benefit and not deferred one—Subsequent Amending Act—Enacting immediate benefit or deferred benefit—Not a declaratory legislation and inapplicable to transfer made before the amendment.

The assessee created two trusts on 24th August, 1957, one called the Charitable Trust and the other referred to as the Second Trust. Under the Second Trust, the assessee transferred his shares in a company to be held by the trustees for the Charitable Trust for a certain period and then for his minor children, in accordance with the terms and conditions set out in the deed. On the question whether the shares were held for the benefit of the minor children and hence includible in the computation of the net wealth of the assessee for the assessment years 1958 and 1959 the High Court in reference held against the assessee. The assessee, by Special Leave, appealed.

The gist of the terms and conditions of the Second Trust deed were as follows. The Preamble set out the intention of the assessee to make a settlement on his minor children. Clause 1 purported to vest the shares in the trustees to hold the same for a period of two years from the date of the trust for the benefit of the Charitable Trust and on the expiry of the period, for the benefit of the minor children. Under clause 21 providing for the accumulation, the Charitable Trust became entitled to the income during the period set out. Clause 22 empowered the trustees to accumulate the income accruing to the minor till 31st July, 1975. Clause 26 provided that notwithstanding anything contained in clauses 21 to 25, the trustees shall have full power in their discretion, to expend the income for the minor.

Held, (by majority): The value of the shares cannot be included in the computation of the net wealth of the assessee as they were not held for the benefit of the minor children.

The word "benefit" occurring in section 4 (1) (a) (iii) of the Wealth Tax Act means, for the individual or his wife or minor child.

If a property is transferred to trustees to hold in trust for the life of A and then for B, it cannot be held that the property is held for the benefit of B during the lifetime of A.

Section 4 (1) (a) (iii) as amended by the Amendment Act (XLVI of 1964), which reads "immediate or deferred benefit" makes a deliberate change and cannot be called a mere declaratory legislation and is inapplicable to the matter in question.

It is well settled that in case of conflict between the recitals in one part of the deed and in another, the earlier dispositions should prevail and the later directions should be disregarded.

Held on the facts, under the deed of the Second Trust for the first two years the beneficiary is the Charitable Trust and not the minor child. Assuming the interest of the minor child to be vested one still the trustees do not hold the shares for the benefit of the minor child as on the relevant valuation dates. The mention of clause 21 in the *non obstante* clause is a typographical error. Even on the basis of conflict of materials in the deed the earlier provisions will have to prevail over what is stated in the later clauses.

Per Shah J The value of the shares is liable to be included in the computation of the net wealth of the assessee under section 4 (1) (a) (iii) of the Act. There was a vested interest immediately arising on the execution of the deed and the minors were the real beneficiaries. This is evident from the *non obstante* clause in the deed allowing the trustees to expend the income of the minors in their discretion.

Appeal by Special Leave from the Judgment and Order dated the 18th November, 1964, of the Mysore High Court in T R C No 4 of 1964

R Venkataram and R Gopalakrishnan Advocates for Appellant

S V Gupte, Solicitor General of India (*R Ganapathy Iyer R H Dhebar and R N Sachthey*, Advocates with him) for Respondent

The Court delivered the following judgments

Sikri, J—(for himself and *K N Wanchoo, J*)—These appeals by Special Leave are directed against the judgment of the Mysore High Court in a reference under section 27 (1) of the Wealth tax Act (XXVII of 1957)—hereinafter referred to as the Act—answering the question

Whether the sums of Rs 4 30 684 and Rs 4 13 353 being the value of the shares transferred by the assessee to the Sandur Ruler's Family (Second) Trust could be included in the net wealth of the assessee for the assessment years 1958 59 and 1959 60 under the provisions of section 4 (1) (a) (iii) of the Wealth tax Act

in favour of the Revenue

The question arose in the following circumstances. The appellant, His Highness Yeshwant Rao Ghorpade, hereinafter referred to as the assessee, held 12,750 shares in Sandur Manganese & Iron Ores Ltd on 31st March, 1957. On 24th August, 1957, he created two trusts: one may be called the Charitable Trust and the other the Sandur Ruler's Family (Second) Trust—(may hereinafter be referred to as the Second Trust). The assessee transferred some shares to the Second Trust under conditions contained in the trust deed. The Wealth tax Officer and the Appellate Assistant Commissioner, in computing the net wealth of the assessee on 31st March, 1958, and 31st March, 1959, the valuation dates respectively for the assessment years 1958 59 and 1959 60, included the value of these shares held by the trustees under the Second Trust. On appeal, the Appellate Tribunal reversed the decisions of the authorities below and came to the conclusion that the value of the shares could not be taken into consideration in computing the net wealth of the assessee. The Tribunal, however, at the instance of the Department, referred the question of law already set out above for the opinion of the High Court. The High Court, as mentioned earlier, answered the question against the assessee. The assessee having obtained Special Leave, the appeals are now before us.

The short question that arises is whether the shares in question held by the trustees under the Second Trust are held for the benefit of the three minor children mentioned in the Second Trust Deed. The answer to this question depends, first on the interpretation of the words 'for the benefit of' minor child in section 4 (1) (a) (ii) of the Act and secondly, on whether on the true interpretation of the Second Trust, these assets are held for the benefit of the minor children. Section 4 (1) (a) (iii) reads as follows—

4 (1) In computing the net wealth of an individual there shall be included as belonging to him

(a) the value of assets which on the valuation date are held

(iii) by a person or association of persons to whom such assets have been transferred by the individual otherwise than for adequate consideration for the benefit of the individual or his wife or minor child or

The learned Solicitor-General, Mr. Gupte, on behalf of the Revenue, contends that the word "benefit" in this section means the immediate or deferred benefit. He says that the amendment of the section made by the Wealth-tax (Amendment) Act, 1964 (XLVI of 1964), which came into force on 1st April, 1965, is in effect declaratory. Section 4 of the Amending Act substituted a new clause for the clause set out above. The new clause is :

"(iii) by a person or association of persons to whom such assets have been transferred by the individual otherwise than for adequate consideration for the immediate or deferred benefit of the individual, his or her spouse or minor child (not being a married daughter) or both or."

We are unable to regard the new amendment as declaratory. The amendment makes a deliberate change and the addition of the words "the immediate or deferred benefit" before the words "of the individual", apart from other changes, cannot be called a mere declaratory legislation, and we must construe the word "benefit" apart from the amendments made by Act XLVI of 1964.

It seems to us that the word "benefit" in the context means for the immediate benefit of the individual or his wife or minor child. If a property is transferred to trustees to hold in trust for the life of A and then for B, we cannot hold that the property is held for the benefit of B during the lifetime of A. As will appear later, under the Second Trust, the trustees hold the trust property for the benefit of the Charitable Trust for a number of years before they start holding it for the benefit of the minor children. It is difficult to say that while the property is being held for the benefit of the Charitable Trust, it is also being held for the benefit of the minor children.

Coming to the second point, namely, whether the trust property is held for the benefit of the minor children within section 4 (1) (a) (iii), it is necessary to carefully consider the terms of the Second Trust Deed, because the High Court has differed from the interpretation placed upon it by the Income-tax Appellate Tribunal.

It is common ground that the trust deed must be considered as a whole. The preamble to the deed reads as follows :

"This Deed of Settlement and Trust is made this 24th day of August, 1957, between His Highness Maharaj Shri Yeshwant Rao Hindu Rao Ghorpade, Ruler of Sandur, now residing at Sandur House, Palace Road, Bangalore, hereinafter called the *Settlor*, of the one part, and His Highness Maharaj Shri Yeshwant Rao Hindu Rao Ghorpade, Ruler of Sandur, and Captain Sardar Dattaji Rao Chander Rao Ranavare, both of whom are hereinafter collectively called the *Trustees*, of the other part :

Whereas the *Settlor* is absolutely entitled to the shares, set out and described in Schedules A, B and C hereto as sole and absolute owner thereof ;

Whereas the *Settlor* had been and is desirous of making a settlement on his two minor sons namely, Rajkumar Shri Shivarao Yeshwantrao Ghorpade, aged 16 years and Rajkumar Shri Venkatrao Yeshwantrao Ghorpade, aged 6 years hereinafter referred to as the First and the Second Beneficiary and on his minor daughter Rajkumari Shri Vijayadevi Yeshwantrao Ghorpade, aged 10 years, hereinafter referred to as the Third Beneficiary, out of natural love and affection towards them of the shares set out in Schedules A, B and C hereto respectively, and with a view to make provision for them :

Whereas the *Settlor* intends and desires to give to his aforesaid minor sons and minor daughter, from time to time, further shares or other assets, with the intention that such further shares or other assets to be given, should be held in trust for the said minor sons and minor daughter in the manner in which they have respectively taken the shares set out and described in Schedules A, B and C hereto, as if the further shares or other assets had formed part of the said Schedules."

It is not necessary to set out the last para. in the preamble. The learned Solicitor-General attaches importance to the recitals in the preamble, but, in our view, the recitals do not assist us in any manner. There is no doubt that the intention of the settlor was to make a settlement on his minor children, but the whole question which arises in this case is whether the settlement made by him is for the benefit of the minor children within section 4 (1) (a) (iii). The word "settlement" is neutral, and the question is what has been settled on the minor children. But there is no doubt that the assessee out of natural love and affection for his minor children created the trust in question, and that the minor children are the beneficiaries under the trust.

Clauses 1, 2 and 3 of the trust deed grant, transfer and convey the shares mentioned in the Schedules A, B and C to the trustees. Clause 1 deals with the shares

settled for the ultimate benefit of the first beneficiary, clause 2 deals with the shares settled for the ultimate benefit of the second beneficiary, and clause 3 deals with the shares settled for the ultimate benefit of the third beneficiary. These clauses are couched in the same language and it is only necessary to set out clause 1, which is in the following terms

"The Settlor doth hereby grant transfer and convey unto the trustees the shares set out and described in Schedule A hereto to have and to hold the same in trust both as to the corpus and income therefrom, for a period of two years from the date of this Indenture for the benefit of Shri Yeshwantrao Maharaj Charitable Trust and on the expiry of the said period of two years to have and to hold the shares set out and described in Schedule A hereto in Trust both as to the corpus and income received after the expiry of the aforesaid period of two years from the date of this Indenture for the benefit of Rajkumar Shri Shivarao Yeshwantrao Ghorpade the First Beneficiary herein as the full absolute and beneficial owner thereof but subject to the terms and conditions hereinafter set forth."

Clause 1 thus purports to vest the shares in the trustees and directs first, that they shall hold the same in trust both as to corpus and income therefrom for a period of two years from 24th August 1957 for the benefit of the Charitable Trust, and secondly, that on the expiry of the said period of two years to hold the shares in trust, both as to corpus and income received after the expiry of the aforesaid period of two years from 24th August, 1957, for the benefit of the first beneficiary. It seems to us clear from reading this clause in isolation from the other clauses, which will be referred to later, that for the first two years the beneficiary is the Charitable Trust and not the Rajkumar, the first beneficiary. For the first two years there is an express direction that the corpus and the income should be held for the benefit of the Charitable Trust. There was some discussion as to why both the corpus and income are mentioned. The word "income" has been defined in clause 31 of the Deed as follows —

In these presents the expression 'income' with reference to any beneficiary shall mean the income derived from the shares set out and described in the Schedule appropriate to such beneficiary and any income that may be derived from the investment of such income including any income that may be derived from any further shares or other assets that may be transferred either by the Settlor or by any other persons for the benefit of any such beneficiary including bonus shares if any

It appears to us that in view of this definition it was perhaps necessary to mention the word "income" in clause 1 because the idea of the settlor was that income accruing in the first year should be invested and further returns secured from it. But it is manifest that the Rajkumar, the first beneficiary, had no interest whatsoever in the income accruing during the first two years from the trust properties. It is true that clause 1 does not direct that the income during the first two years should be handed over to the Charitable Trust, but this is made clear in clause 21, which we shall presently consider.

The next relevant clause is clause 9 which reads as under

"This Settlement and Trust is hereby declared to be irrevocable and shall take effect immediately and all trusts settlements and interests granted or created by these presents shall vest in the respective Beneficiaries immediately

Mr. Gupte relied on this clause to show that the interest of the minor children was a vested interest and not a contingent interest. Assuming that it is so, it still does not assist us in answering the question which we have posed above. Assuming the interest to be vested we still have to consider whether the trustees hold the shares for the benefit of the minor children as on the valuation dates, i.e., 31st March, 1958 and 31st March, 1959.

Clause 21 to which reference was made a short while ago, and the provisos thereto, are as follows. We may mention that the High Court thought that the provisos were irrelevant but in our view they throw a great deal of light on the question before us.

"21. The trustees may, in their absolute discretion, accumulate the income accruing under this settlement to the benefit of Shri Yeshwantrao Maharaj Charitable Trust for a period of two years from the date of this Indenture as respects the shares set out and described in Schedule A hereto and for a period of twelve years from the date of this Indenture as respects the shares set out and described in Schedule B hereto and for a period of eight years from the date of this Indenture as respects the shares set out and described in Schedule C hereto.

Provided that :

(a) The trustees may, at any time and from time to time, during the aforesaid period of two years from the date of this *Indenture*, pay to the trustees of Shri Yeshwantrao Maharaj Charitable Trust the whole or any part of the income accruing under this settlement in respect of shares set out and described in Schedule A hereto, during the said period of two years as the trustees may, from time to time, deem fit and on the expiry of the said period of two years, the trustees shall pay over to the trustees of the said Shri Yeshwantrao Maharaj Charitable Trust the whole or the balance of the said income as the case may be, and thereupon the trustees shall stand discharged of all their obligations to the aforesaid Charitable Trust and thereafter the said Charitable Trust shall have no right or claim whatsoever either to the income or the corpus of the said shares set out and described in Schedule A hereto."

Provisos (b) and (c) are in similar terms and deal with the shares set out in Schedule B and Schedule C, respectively, the only difference being about the period during which the income accruing could be paid to the Charitable Trust and the period after which the trustees were under an obligation to pay to the Charitable Trust the whole or the balance of the said income. It seems to us quite clear from clause 21 that the intention of the settlor was that the income from the shares mentioned in Schedule A should be either paid over to the Charitable Trust during the period of two years, or if it is not paid over during the two years, it should be paid over to the Charitable Trust on the expiry of the said two years.

Now reading clause 1 and clause 21 with proviso (a) it seems to us that it is the charitable trust which is entitled to the income of the shares in Schedule A during the first two years. Reading clause 2 and clause 21 with proviso (b) it is equally clear that it is the charitable trust which is entitled to the income from the shares set out in Schedule B for a period of 12 years. Further it is manifest that reading clause 3 and clause 21 with proviso (c) it is the charitable trust which is entitled to the income from the shares set out in Schedule C during the first eight years. During these periods the first, second and third beneficiary had no interest whatsoever in that income.

The learned Solicitor-General says that this may be so if we only consider clauses upto 21, but if we consider clauses 22, 23, 24, 25 and 26, they override the intention manifested upto now. Clauses 22, 23 and 24 enable the Trustees to accumulate the income accruing under the settlement to the first, second and the third beneficiary respectively till 31st July, 1975. We may only set out clause 22 which deals with the first beneficiary. Clause 22 reads as follows :

"The trustees may in their absolute discretion accumulate the income accruing under this Settlement and Trust to the First Beneficiary herein until the 31st July, 1975 and on the aforesaid date shall make over to him all the trust funds in the possession of the trustees as may belong to the said Beneficiary."

In our view, clause 22 enables the trustees to accumulate only the income accruing to the first beneficiary; it does not say what income accrues to the first beneficiary. For that we have to look to the other clauses. It is only under the latter part of clause 1 of the trust deed that income accrues to the first beneficiary. Clause 25 deals with the eventuality of the first, second or the third beneficiary dying before 31st July, 1975. It does not really throw much light on the question. The next clause, clause 26, is important, and Mr. Gupte strongly relies on this clause. This clause reads as follows :

"Notwithstanding anything contained in clauses 21 to 25 supra, the Trustees shall have full power during the currency of this Settlement and Trust to expend from out of the income accruing under this Settlement to each of the beneficiaries herein such amount as the trustees may in their discretion deem fit for the maintenance, education, health, marriage and advancement of each of the beneficiaries herein."

Mr. Gupte says that this clause shows that all the previous clauses are a smoke-screen to enable the Trustees to spend the money for the benefit of the beneficiaries even during the aforementioned periods of 2, 12 and 8 years, and he says that the *non obstante* clause overrides everything contained in clauses 21 to 25. There is no doubt that clause 21 is mentioned in the *non obstante* clause, but we agree with Mr. Venkataraman, the learned Counsel for the assessee, that the mention of clause 12 seems to be a typographical mistake, for the meaning of the clause is quite clear that the trustees cannot under this clause expend from out of the income accruing under the settlement to the charitable trust for their power to spend is limited to the income

accruing under the settlement to each of the beneficiaries, and as we have mentioned before while dealing with clause 21, the only income that accrues to the three beneficiaries under the settlement is after it ceases to be accumulated for or given to the Charitable Trust. If we were to accept Mr Gupte's argument we would have to omit the words "to each of the beneficiaries herein" occurring in the clause. Mr Gupte contends that the word "beneficiary" would include the Charitable Trust. We are unable to agree because the latter portion of the clause deals with education, marriage, etc., and these can have reference only to the first, second and the third beneficiary, i.e., his minor children. Mr Gupte urges that it would be natural on the part of the settlor to provide for the maintenance, education, health, marriage and advancement of each of the beneficiaries during their minority, and it would be unnatural to attribute intention to him to leave them without any means of sustenance during their minority. There is no force in this contention. The settlor may well have thought that he would look after the minor children during their minority, and what he wanted to provide was for their expenses after they had attained the age of about 18. It would be recalled that the effect of the earlier provisions is that income starts accruing under the settlement to each of the minor children when they reached the age of about 18. We are accordingly of the opinion that clause 26 does not cut down the interest which had been settled on the Charitable Trust.

We may mention that in this connection Mr Venkataraman drew our attention to the rule of construction laid down by this Court in *Sohebzada Mohommed Kamgar Shah v Jagdish Chondra Deo Dhabal Deo*¹ and *Romkishore Lal v Kamal Noram*². In the latter case Das Gupta J speaking for the Court, observed as follows —

Sometimes it happens in the case of documents as regards disposition of properties whether they are testamentary or non testamentary instruments that there is a clear conflict between what is said in one part of the document and in another. A familiar instance of this is where in an earlier part of the document some property is given absolutely to one person but later on other directions about the same property are given which conflict with and take away from the absolute title given in the earlier portion. What is to be done where this happens? It is well settled that in case of such a conflict the earlier disposition of absolute title should prevail and the later directions of disposition should be disregarded as unsuccessful attempts to restrict the title already given. (See *Sohebzada Mohd Kamgar Shah v Jagdish Chandra Deo Dhabal Deo*¹). It is clear however, that an attempt should always be made to read the two parts of the document harmoniously, if possible. It is only when this is not possible e.g., where an absolute title is given in clear and unambiguous terms and the later provisions trench on the same that the later provisions have to be held to be void.

In our opinion these observations would apply to the facts of this case if it is held that there is conflict between clauses 1 and 21 on the one hand and clause 26 on the other. But, in our view, all these clauses can be read harmoniously by holding that the mention of clause 21 in clause 26 is a typographical mistake and clause 26 deals only with the income which accrues to the first, second and third beneficiary after the interest of the Charitable Trust has ceased.

In conclusion we hold that considering the document as a whole the shares were not held for the benefit of the three minor children as on 31st March, 1958 and 31st March 1959. Accordingly the answer to the question referred by the Appellate Tribunal and set out above must be against the Revenue.

The appeals are accordingly allowed, judgment of the High Court set aside and the question referred to the High Court answered in the negative. The assessee will be entitled to costs here and in the High Court. One hearing fee.

Shah, J — The High Court of Mysore answered the following question referred under section 27 (1) of the Wealth tax Act XXVII of 1957 in the affirmative.

Whether the sums of Rs 4,30,684 and Rs 4,13,353 being the value of the shares transferred by the assessee to the Sandur Ruler's Family (Second) Trust could be included in the net wealth of the assessee for the assessment years 1958-59 and 1959-60 under the provisions of section 4 (1) (a) (iii) of the Wealth tax Act?

The Wealth tax Bill was moved before the Parliament on 15th May, 1957, and was enacted as law after receiving the assent of the President on 12th September, 1957.

The two trust deeds which fall to be construed in these appeals were executed on 24th August, 1957. The object of the settlor of the two deeds of trust was to evade the charge of wealth-tax on the properties covered thereby. It was so found by the High Court, and that was not denied before us. But it is open to a taxpayer to so order his affairs that incidence of tax may lawfully be avoided. Attempts at evading incidence of taxation though not commendable are not illegal. In each case the Court must take the taxing statute as it stands, subject to all its imperfections : if a transaction does not fairly fall within the letter of the law, the Court will not seek to put a strained construction to bring it within the law. The Court will not also stretch a point in favour of the taxpayer to enable him to get by his astuteness the benefit which other taxpayers do not obtain.

The two trust deeds were executed on 24th August, 1957. One is a trust deed styled "Shri Yeshwant Rao Maharaj Charitable Trust"—hereinafter called "the Charitable Trust"—and the other is styled "The Sandur Ruler's Family (Second) Trust"—hereinafter called "the Family Trust". Of both these trusts, Yeshwant Rao Ghorpade, Ruler of Sandur, is the settlor and the trustees are the settlor and Captain Sardar Dattaji Rao Chender Rao Ranavare. Under the Charitable Trust the income and all the assets of the trust funds are liable to be utilised for advancement of knowledge, education, health, safety or any other object of general public utility or beneficial to mankind. The settlor is to be the Chairman of the Board of Trustees during his lifetime and he has power to fill up the vacancy in the office of a trustee. In case of his death, the Ruler of Sandur for the time being is entitled to fill the vacancy of the office of trustee. Under this deed no property is settled for the trust. By clause 3 the assets and the funds of the trust are to be such sums as the founder trustees may contribute or in any manner provide to the trust, such sums or assets as may be contributed, gifted or donated by any person or company to the trust, all interest or income arising out of the said sums and assets, all assets that may be purchased or acquired from out of the said funds or otherwise acquired for the trust, all investments and realisations therefrom out of the said funds, and assets, and all sums and assets which have by any means become the property of the trust. By clause 4 the trustees are authorised to accept any donation or other sums of money or other assets from any person or company subject to any special conditions as may be agreed upon, but not so as to be inconsistent with the intent and purposes of the trust.

Simultaneously with the Charitable Trust, the Family Trust was executed. Initially the settlement was to operate in respect of 30 ordinary shares of the Sandur Manganese and Iron Ores (Private), Ltd., ten shares described in Schedule A to be held in trust for the benefit of Rajkumar Shivarao, the First Beneficiary, ten shares described in Schedule B to be held in trust for the benefit of Rajkumar Venkatrao, the Second Beneficiary, and the remaining ten shares described in Schedule C to be held in trust for the benefit of Rajkumari Vijayadevi, the Third Beneficiary. By paragraph 2 of the preamble it is declared that the settlor was desirous of making a settlement.

"on his two minor sons, namely Rajkumar Shri Shivarao Yeshwantrao Ghorpade, aged 16 years and Rajkumar Shri Venkatrao Yeshwantrao Ghorpade, aged 6 years * * * and on his minor daughter Rajkumari Shri Vijayadevi Yeshwantrao Ghorpade, aged 10 years * * * out of natural love and affection towards them * * * and with a view to make provision for them."

and by the third paragraph of the preamble it was declared that the settlor intended and desired to give to his minor sons and daughter from time to time further shares or other assets, with the intention that such further shares or other assets should be held in trust for the minor sons and daughter to be taken by them as set out and described in Schedules A, B and C, as if such shares or other assets had formed part of the said Schedules. The primary intention disclosed by the preamble of the deed of trust was that the settlor settled properties described in Schedules A, B and C and declared his intention to settle other properties in future with the object of making provision for his three named children. The quantum of the estate settled must undoubtedly be determined by the habendum clause, but the preamble may in case of ambiguity be resorted to for ascertaining the object of the deed and the intention

of the executant By the first clause the settlor conveyed to the trustees the shares described in Schedule A, and to hold the same in trust

' both as to the corpus and income therefrom for a period of two years from the date of the Indenture for the benefit of the Charitable Trust and on the expiry of the said period of two years to have and to hold the shares set out and described in Schedule A * * in trust both as to the corpus and income received after the expiry of the * * period of two years * * for the benefit of The First Beneficiary as the full absolute and beneficial owner thereof but subject to the terms and conditions hereinafter set forth '

Similarly the shares described in Schedule B were conveyed for twelve years for the benefit of the Charitable Trust and thereafter for the benefit of the Second Beneficiary, and by clause 3 the settlor conveyed the shares described in Schedule C for a period of eight years for the benefit of the Charitable Trust and thereafter to the Third Beneficiary By clause 4 it is declared that other shares or assets given to all or any of the beneficiaries and transferred to the trustees will be held in trust for all or any of the beneficiaries as may in accordance with the settlement and trust be specified, and subject to the same limitations, interests and conditions as relate to the shares specified in Schedules A, B and C, as if those other shares or assets so transferred had formed part of the Schedules A, B and C as may be specified by the settlor or such other person Clause 31 of the deed of trust defines the expression ' income ' with reference to any beneficiary as meaning income derived from the shares set out and described in the Schedule appropriate to such beneficiary and any income that may be derived from the investment of such income including any income that may be derived from any further shares or other assets that may be transferred for the benefit of any such beneficiary

The scheme of clauses 1, 2, 3 and 4 of the Family Trust may first be examined The shares initially settled and any other shares or assets subsequently settled for the benefit of the beneficiaries or any of them are by clause 4 to be dealt with as if they formed part of the three Schedules The Charitable Trust is to obtain the benefit of the property in Schedules A, B and C both as to the corpus and income, approximately for the periods during which the three beneficiaries do not attain their respective ages of eighteen years, and income therefrom is to be held for the benefit of the Charitable Trust and on the expiry of the periods mentioned, the shares and the assets are to be held in trust both as to the corpus and income therefrom for the benefit of the First, Second or the Third Beneficiary The scheme devised by the settlor is that during the minority of each beneficiary the property in Schedules A, B and C *qua* each beneficiary is to remain vested in the trustees for the benefit of the Charitable Trust, and after expiry of the period specified the corpus and income is to be held for the full, absolute and beneficial ownership of the respective beneficiaries By clauses 6, 7 and 8 provision is made for appointment of trustees It may suffice to mention that the settlor during his lifetime is to be the trustee and has in case of vacancy power to appoint new trustee by writing or by will, and by clause 10 the custody of the trust assets and every portion thereof is to remain with the settlor and the trustees have full power to alter the investments in their absolute discretion Clause 9 reads as follows

' This Settlement and Trust is hereby declared to be irrevocable and shall take effect immediately and all trusts settlements and interests granted or created by these presents shall vest in the respective beneficiaries immediately

It is not clear whether in clause 9 the charity is intended to be designated as a beneficiary From the Schedules and clauses 1, 2 and 3 it appears that the beneficiaries were to be the three children of the settlor Even granting that charity was intended to be a beneficiary within the meaning of clause 9, the instrument vests the interests granted or created to the respective beneficiaries immediately on execution, and therefore the interest which enures to the three children of the settlor under the instrument vests in them immediately By clause 21 it is directed that the trustees may, in their absolute discretion, accumulate the income accruing under the settlement for the benefit of the Charitable Trust for a period of two years from the date of the indenture as respects the shares set out and described in Schedule A for a period of twelve years as respects the shares set out and described in Schedule B and for a period

of eight years as respect the shares set out and described in Schedule C. The direction is not obligatory, but permissive. By the first proviso the trustees are authorised to pay at any time, and from time to time, during the period of two years, to the trustees of the charity the whole or any part of the income accruing under the settlement in respect of shares set out in Schedule A, and on the expiry of the said period the trustees are enjoined to pay over to the trustees of the charity the whole or the balance of the income as the case may be, and thereupon the trustees stand discharged of all their obligations to the charity. Similar provision is made by provisos (b) and (c) with regard to payment of income from the shares during the period of twelve years in respect of shares set out in Schedule B and during the period of eight years in respect of shares described in Schedule C. *Prima facie*, this may indicate that the income to be received from the shares is to be applied for the benefit of charity in respect of the shares set out in Schedules A, B and C during the specified periods and that the children of the settlor are not to have any interest in that income. By clauses 22, 23 and 24 an absolute discretion is conferred upon the trustees to accumulate the income until 31st July, 1975 in respect of the shares mentioned in each of the Schedules and on the expiry of that period to make over to the Trust funds as may belong to the beneficiaries. This is clearly intended to maintain the control of the settlor over the properties settled in trust till 31st July, 1975. By clause 25 it is directed that the trustees shall have control over the trust funds and the income, even if any of the beneficiary dies before 31st July, 1975. Clause 26 provides :

"Notwithstanding anything contained in clauses 21 to 25, *supra*, the trustees shall have full power during the currency of this Settlement and Trust to expend from out of the income accruing under this Settlement to each of the beneficiaries herein such amount as the trustees may in their discretion deem fit for the maintenance, education, health, marriage and advancement of each of the beneficiaries herein."

Clause 26 confers upon the trustees full power during the currency of the settlement and trust to expend the income accruing under the settlement to each of the beneficiaries therein for the maintenance, education, health, marriage and advancement of the beneficiaries. This power is exercisable notwithstanding any provision to the contrary made in clauses 21 to 25. It may be recalled that clause 21 confers upon the trustees power either to use the income accruing under the trust for the benefit of trust during the period prescribed, or to accumulate the income and deliver it on the expiry of the periods specified to the trustees of the Charitable Trust. But by clause 26 the trustees under this trust are competent to expend the income not for charity, nor to pay it over to the trustees of the Charitable Trust, but for maintenance, education, health, marriage and advancement of the beneficiaries.

The relevant provisions of the Wealth-tax Act may now be summarised. By section 3 wealth-tax is charged for every financial year commencing on and from 1st April, 1957, on the net wealth on the corresponding valuation date, on every individual, Hindu undivided family and company. By section 4, net wealth is to include certain assets. Clause (1) (a) (iii) of section 4 provides that :

"In computing the net wealth of an individual, there shall be included, as belonging to him—

(a) the value of assets which on the valuation date are held

(iii) by a person or association of persons to whom such assets have been transferred by the individual otherwise than for adequate consideration for the benefit of the individual or his wife or his minor child."

Section 5 provides for exemptions of certain assets in the computation of net wealth. It provides in so far as it is material that :

"Wealth-tax shall not be payable by an assessee in respect of the following assets, and such assets shall not be included in the net wealth of the assessee—

(i) any property held by him under trust or other legal obligation for any public purpose of a charitable or religious nature in India."

Under the instrument of Family Trust the assets included in the Schedules A, B and C were on the valuation date held by an association of persons and those assets were transferred by the settlor otherwise than for adequate consideration. But says

the settlor, on the valuation date the assets were not held for the benefit of himself, his wife or minor children, since, they were held both as to corpus and income for the benefit of charity during the minority of his children. If on a true interpretation of the deed this plea be correct, the assets are not liable to be included in the net wealth of the settlor for the levy of wealth tax.

I agree with Counsel for the settlor that the amendment made in section 4 (1) (a) (ui) by Act XLVI of 1964 which sought to include in the computation of net wealth, assets transferred for "the immediate or deferred benefit of the individual, his or her spouse, or minor child" is not declaratory of pre existing law. Under the clause as originally enacted, assets transferred for the immediate benefit of the individual, his wife or minor children alone may be included in the net wealth of the individual, and the liability of the settlor must be determined under the provision as it stood enacted in 1957. The question then is: Are the assets transferred by the settlor under the Family Trust instrument for the immediate benefit of his minor children? That question can only be answered on a determination of the total effect of the instrument in the light of the diverse clauses.

By the Family Trust the primary intention of the settlor as disclosed in the preamble is to make provision for his children and for that purpose property is set apart by the Schedule read with clauses 1, 2 and 3. By clause 4 it is contemplated that other property will also be settled for the benefit of the children of the settlor. By clause 9 the interest created under the deed vests immediately in the beneficiaries and by clause 26 notwithstanding the provisions made in clauses 21 to 25 directing application of the income from property set out in Schedules A, B and C for limited periods in favour of charity, the trustees have the power during the currency of the settlement to expend from out of the income accruing under the settlement to each of the beneficiaries such amount as the trustees may in their discretion deem fit for their maintenance, education, health, marriage and advancement of each of the beneficiaries therein. If by this clause power is conferred upon the trustees to direct the income of the property in Schedules A, B and C for the benefit of the children even during the periods specified in clauses 1, 2 and 3 the assets are unquestionably transferred for the immediate benefit of the children. But it was urged that the inclusion of figure "21" in clause 26 is the result of a typographical error and it should have read as clause 22. But even clause 25 refers to the application of the income for limited periods in the event of death of any of the beneficiaries and thereafter for the heirs of the beneficiary, and that is not said to be an error—typographical or otherwise. Again the argument that reference to clause 21 was due to an error was never raised before the High Court. If there was any substance in that argument, the settlor would have executed a deed of rectification correcting the error after setting out the circumstances in which that error came to be made.

It was urged that the power which the trustees could exercise is to expend the income accruing under the settlement for each of the beneficiaries under the Trust, and since no income accrued to the beneficiaries during the periods for which the income was to be applied or accumulated for the benefit of charity, reference to clause 21 in clause 26 had no meaning. It is implicit in this submission that the settlor intended that the income arising from the Trust property was to be utilized after the children attained the age of majority for their maintenance, education, health, marriage and advancement, and not during their minority. The children stood in greater need of provision for maintenance, education, health and advancement during their minority than after they attain their majority, but it is said contrary to the plain terms of clause 26 that the interest was intended to be given to them after they attained the age of majority, and not during their minority.

In the deed of settlement charity is not directly mentioned as one of the beneficiaries and the income is directed to be given for limited periods to charity and thereafter to the beneficiaries named therein. Clause 26 in terms confers power upon the trustees to expend from out of the income accruing under the settlement to each of the beneficiaries such amounts for the maintenance, education, health, marriage and advancement of the beneficiaries or any of them as the Trustees deem fit, and there

is nothing in that clause which implies that this power is to be exercised after expiry of the periods specified in clauses 1, 2, and 3. The expression "beneficiary" in clause 26 clearly refers not to charity, but to the three children of the settlor, because the trustees are invested with power to expend from out of the income accruing under the settlement for the maintenance, education, health, marriage and advancement of each of the beneficiaries therein.

Reading clauses 9 and 26 together it appears that the settlor intended that the trustees shall have power, notwithstanding other provisions in the deed of trust, that the income of the property settled may be applied during the currency of the settlement for the benefit of the beneficiaries named therein, and in the event of death of any of the beneficiaries, for the benefit of his or her heirs. There was therefore a vested interest immediately arising on the execution of the instrument, and the children of the settlor were the real beneficiaries. In seeking to evade the application of the Wealth-tax Act, clumsy and inconsistent directions are made in the Family Trust : the trustees are initially directed to apply the income accruing from the shares for certain specified periods to charity, and if the income is not so applied during the periods the accumulated income is directed to be handed over to charity but the direction is immediately followed by the clause that the trustees may apply the income notwithstanding the provision relating to the application of the income in favour of charity, for the benefit of the minor children of the settlor. The High Court has held that the case fell clearly within section 4 (1) (a) (iii) of the Wealth-tax Act and during the periods specified in clauses 1, 2 and 3 the property mentioned in Schedules A, B and C was liable to be included in the computation of wealth tax of the appellant, and in my view the High Court is right in so holding.

The appeals fail and are dismissed with costs.

ORDER OF THE COURT:—In accordance with the opinion of the majority, the appeals are allowed with costs here and in the High Court. One hearing fee.

V.S.

Appeals allowed.

THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT :—K. SUBBA RAO, J. C. SHAH AND R. S. BACHAWAT, JJ.

Nathulal

.. *Appellant**

v.

The State of Madhya Pradesh

.. *Respondent.*

Essential Commodities Act (X of 1955), section 7—Contravention of order under section 3—Mens rea—If essential for offence—Madhya Pradesh Foodgrains Dealers Licensing Order (1958), section 3—Person storing grains in excess of permitted quantity in bona fide belief that his application for licence will be duly granted—If guilty of any offence.

Having regard to the scope of the Essential Commodities Act (X of 1955), it would be legitimate to hold that a person commits an offence under section 7 of the Act if he intentionally contravenes any order made under section 3 of the Act. So construed the object of the Act will be best served and innocent persons will also be protected from harassment. It cannot be said that the object of the Act would be defeated if *mens rea* is read as an ingredient of the offence.

In the instant case the accused stored the goods under a *bona fide* impression that the licence in regard to which he had made an application was issued to him though not actually sent to him. The fact the licensing authority did not communicate to him the rejection of his application confirmed the accused's belief. On that belief he proceeded to store the foodgrains by sending the relevant returns to the authority concerned. It was, therefore, a storage of foodgrains within the prescribed limits under a *bona fide* belief that he could legally do so. He did not therefore intentionally contravene the provisions of section 7 of the Essential Commodities Act or those of the Order made under section 3 of the Act. Therefore the accused must be acquitted.

Per *Shah J*—It is true that the accused carried on business as a dealer in the expectation based on assurances given to him by the Inspector that a licence will be issued to him, but in carrying on the business as a dealer he contravened section 3 of the Madhya Pradesh Foodgrains Dealers Licensing Order 1958 because he held no licence. The authorities under the Order are not bound to issue a licence merely because it is applied for, nor is there any provision in the Order as is to be found in certain statutes relating to administration of Municipalities, that permission shall be deemed to be issued if for a period specified in the statute no reply is given by the prescribed authority to an application for grant of permission.

Appeal by Special Leave from the Judgment and Order, dated 3rd May, 1963, of the Madhya Pradesh High Court (Indore Bench) at Indore in Criminal Appeal No 321 of 1962

G S Pathak Senior Advocate (*S N Andley* and *Rameshwar Nath*, Advocates of *M/s Rajinder Narain & Co*, with him) for Appellant

B Sen, Senior Advocate (*I N Shroff*, Advocate, with him), for Respondent

The Court delivered the following Judgments

Subba Rao, J (on behalf of himself and *Bachawat, J*)—The appellant is a dealer in foodgrains at Dhar in Madhya Pradesh. He was prosecuted in the Court of the Additional District Magistrate, Dhar, for having in stock 88½ maunds and 2½ seers of wheat for the purpose of sale without a licence and for having thereby committed an offence under section 7 of the Essential Commodities Act 1955 (X of 1955), hereinafter called the Act. The appellant pleaded that he did not intentionally contravene the provisions of the said section on the ground that he stored the said grains after applying for a licence and was in the belief that it would be issued to him. The learned Additional District Magistrate, Dhar, found on evidence that the appellant had not the guilty mind and on that finding acquitted him. On appeal a Division Bench of the Madhya Pradesh High Court, Indore Bench, set aside the order of acquittal and convicted him on the basis that in a case arising under the Act "the idea of guilty mind" was different from that in a case like theft and that he contravened the provisions of the Act and the order made thereunder. It sentenced the appellant to rigorous imprisonment for one year and to a fine of Rs 2 000 and in default of payment of the fine he was to undergo rigorous imprisonment for six months. Hence the appeal.

Mr Pathak, learned Counsel for the appellant, mainly contended that *mens rea* was a necessary ingredient of the offence under section 7 of the Act, that as on the finding given by the learned Magistrate the appellant had no intention to contravene the provisions of the Act and the Order made thereunder, the High Court went wrong in setting aside the order of acquittal.

The material provisions of the Act and the Order made thereunder may be read at this state.

Section 7 of the Act

"(1) If any person contravenes any order made under section 3—

(a) he shall be punishable—

(ii) in the case of any other order, with imprisonment for a term which may extend to three years and shall also be liable to fine

The Madhya Pradesh Foodgrains Dealers Licensing Order, 1958—

Section 2—In this Order, unless the context otherwise requires—

"(a) 'dealer' means a person engaged in the business of purchase, sale or storage for sale of any one or more of the foodgrains in quantity of one hundred maunds or more at any one time whether on one's own account or in partnership or in association with any other person or as a commission agent or *arhatiya* and whether or not in conjunction with any other business

Section 3—(1) No person shall carry on business as a dealer except under and in accordance with the terms and conditions of a licence issued in this behalf by the licensing authority

(2) For the purpose of this clause any person who stores any foodgrains in quantity of one hundred maunds or more at any one time shall, unless the contrary is proved, be deemed to store the foodgrains for the purposes of sale."

A combined reading of these provisions shows that if a dealer in foodgrains as defined in the Order carries on business as a dealer without a licence, he commits an offence under section 7 of the Act and is liable to imprisonment and fine thereunder. Sub-section (2) of section 3 of the Order raises a rebuttable presumption that if a dealer stores foodgrains in quantity of 100 maunds or more he shall be deemed to have stored the said foodgrains for the purpose of sale. The question is whether under section 7 of the Act a factual non-compliance of the Order by a dealer will amount to an offence thereunder even if there is no *mens rea* on his part. Learned Counsel for the appellant contends that *mens rea* is an integral part of the offence; where as learned Counsel for the respondent argued that the Act being one made in the interests of the general public for the control of the production, supply and distribution of, and trade and commerce in, certain commodities, *mens rea* is not one of the ingredients of the offence.

The law on the subject is fairly well settled. It has come under judicial scrutiny of this Court on many occasions. It does not call for a detailed discussion. It is enough to restate the principles. *Mens rea* is an essential ingredient of a criminal offence. Doubtless a statute may exclude the element of *mens rea*, but it is a sound rule of construction adopted in England and also accepted in India to construe a statutory provision creating an offence in conformity with the common law rather than against it unless the statute expressly or by necessary implication excluded *mens rea*. The mere fact that the object of the statute is to promote welfare activities or to eradicate a grave social evil is by itself not decisive of the question whether the element of guilty mind is excluded from the ingredients of an offence. *Mens rea* by necessary implication may be excluded from a statute only where it is absolutely clear that the implementation of the object of the statute would otherwise be defeated. The nature of the *mens rea* that would be implied in a statute creating an offence depends on the object of the Act and the provisions thereof: see *Srinivas Mall Bairoliya v. King Emperor*¹, *Ravula Hariprasada Rao v. The State*²; and *Sarjoo Prasad v. The State of Uttar Pradesh*³. Most of the relevant English decisions on the subject were referred to in the judgment of this Court in *The State of Maharashtra v. Mayer Hans George*⁴. How to disprove *mens rea* has been succinctly stated in Halsbury's Laws of England, 3rd Edition, Volume 10, at page 283, thus :

"When the existence of a particular intent or state of mind is a necessary ingredient of the offence, and *prima facie* proof of the existence of the intent or state of mind has been given by the prosecution, the defendant may excuse himself by disproving the existence in him of any guilty intent or state of mind for example, by showing that he was justified in doing the act with which he is charged, or that he did it accidentally, or in ignorance, or that he had an honest belief in the existence of facts which, if they had really existed, would have made the act an innocent one. The existence of reasonable grounds for a belief is evidence of the honesty of that belief."

Having regard to the object of the Act, namely, to control in general public interest, among others, trade in certain commodities, it cannot be said that the object of the Act would be defeated if *mens rea* is read as an ingredient of the offence. The provisions of the Act do not lead to any such exclusion. Indeed, it could not have been the intention of the Legislature to impose heavy penalties like imprisonment for a period upto 3 years and to impose heavy fines on an innocent person who carries on business in an honest belief that he is doing the business in terms of the law. Having regard to the scope of the Act it would be legitimate to hold that a person commits an offence under section 7 of the Act if he intentionally contravenes any order made under section 3 of the Act. So construed the object of the Act will be best served and innocent persons will also be protected from harassment.

The question, therefore, is whether on the facts found the appellant had intentionally contravened the provisions of section 7 of the Act and the Order made thereunder. Now let us look at the facts of the case.

1. (1947) 2 M.L.J. 328; (1947) I.L.R. 26 Pat. 460 (P.C.).

2. (1951) S.C.J. 296; (1951) 1 M.L.J. 612; (1951) S.C.R. 322.

3. (1961) 1 S.C.J. 484; (1961) M.L.J. (Cr.)

284; (1961) 1 M.L.J. (S.C.) 133; (1961) 1 An.W.R. (S.C.) 133; (1961) 3 S.C.R. 324.

4. (1966) 1 S.C.J. 363; (1966) M.L.J. (Cr.) 248; (1965) 35 Cam. Cas. 557.

The appellant is a dealer in foodgrains at Dhar. The Order was made in exercise of the powers conferred under section 3 of the Act. Under section 3 of the Order no person shall carry on business as a dealer except under and in accordance with the terms and conditions of a licence issued in this behalf by the licensing authority. Under sub section (2) of section 3 of the Order if a person stores any foodgrains in quantity of 100 maunds or more at any one time shall, unless the contrary is proved, be deemed to store the foodgrains for the purpose of sale. Pursuant to that Order the appellant on 30th September, 1960, made an application for a licence to the licensing authority in Form A, clause 4 (1) of the Order and deposited the requisite licence fee. There was no intimation to him that his application was rejected. He was purchasing foodgrains from time to time and sending returns to the Licensing Authority showing the grains purchased by him. He did not sell any grains purchased by him. On 2nd September, 1961, when the Inspector of Food and Civil Supplies, Dhar, checked the godowns of the appellant he had stored 885 maunds and 2½ seers of wheat for sale. The said storage of the foodgrains for sale would be valid if he had a licence. The learned District Magistrate found the said facts on the evidence adduced before him and the High Court did not take a different view on the said facts except that it made a remark that there was not a particle of evidence to show that he had sent the returns to the authority. Indeed the Magistrate said that the said fact was not disputed before him. We, therefore, for the purpose of this appeal ignore the remark made by the High Court. When the accused was questioned by the Magistrate he stated thus:

I deposited the fee by challan for getting the licence for the year 1961. I submitted the application. I continued to submit the fortnightly returns of receipts and sales of foodgrains regularly. No objection was raised at the time when returns were submitted. I made continuous efforts for two months to get the licence. The Inspector gave me assurance that I need not worry the licence will be sent to my residence. It was told by the Inspector Bage. I was asked to drop donation of Rs 10 in the donation box for the treatment of soldiers. It was told that if the donation is dropped, the licence will be issued within a day or two. I wanted to drop of Rs 5 only. In this way licences were determined. Other dealers also continued to do the business in the like manner. The business was done with a good intention.

The answer given by the accused is consistent with the evidence adduced in the case. The Additional District Magistrate in substance accepted the defence. If so it follows that the accused stored the goods under a *bona fide* impression that the licence in regard to which he had made an application was issued to him though not actually sent to him. The fact that the licensing authority did not communicate to him the rejection of his application confirmed the accused's belief. On that belief he proceeded to store the foodgrains by sending the relevant returns to the authority concerned. It was, therefore, a storage of foodgrains within the prescribed limits under a *bona fide* belief that he could legally do so. He did not, therefore, intentionally contravene the provisions of section 7 of the Act or those of the Order made under section 3 of the Act. In the result we set aside the order of the High Court convicting the appellant and acquit him of the offence with which he was charged. The bail bond is discharged. If any fine had been paid, it shall be returned.

Shah, J—Definitions of diverse offences under the Indian Penal Code state with precision that a particular act or omission to be an offence must be done maliciously, dishonestly, fraudulently, intentionally, negligently or knowingly. Certain other statutes prohibit acts and penalise contravention of the provisions without expressly stating that the contravention must be with a prescribed state of mind. But an intention to offend the penal provisions of a statute is normally implicit however comprehensive or unqualified the language of the statute may appear to be, unless an intention to the contrary is expressed or clearly implied, for the general rule is that a crime is not committed unless the contravenor has *mens rea*. Normally full definition of every crime predicates a proposition expressly or by implication as to a state of mind, if the mental element of any conduct alleged to be a crime is absent in any given case, the crime so defined is not committed.

I have no doubt that an offence under section 7 of the Essential Commodities Act (X of 1955) for breach of section 3 of the Madhya Pradesh Foodgrains Dealers Licensing Order, 1958, necessarily involves a guilty mind as an ingredient of the

offence. In terms, section 3 of the Order, prohibits every person from carrying on business as a dealer except under and in accordance with the terms and conditions of a licence issued in that behalf by the Licensing authority. A dealer is defined by section 2 (a) of the Order as meaning a person engaged in the business of purchase, sale or storage for sale, of any one or more of the foodgrains in quantity of one hundred maunds or more at any one time whether on one's own account or in partnership or in association with any other person or as a commission agent or *arhatiya*, and whether or not in conjunction with any other business. By sub-section (2) of section 3 a presumption is raised that "any person who stores any foodgrains in quantity of one hundred maunds or more at any one time shall, unless the contrary is proved, be deemed to store the foodgrains for the purposes of sale". The Order prohibits every person from carrying on business as a dealer otherwise than in accordance with the terms and conditions of the licence, and a dealer is a person who carries on business of purchase, sale or storage for sale of foodgrains in excess of the specified quantities. For the contravention of such a prohibition to be an offence, *mens rea* is necessary condition.

But the appellant at the material time did store foodgrains considerably in excess of hundred maunds and held no licence to carry on the business as a dealer under the Licensing Order. His defence at the trial for contravention of section 3 of the Order was that he had applied for a licence and had deposited the requisite fee for obtaining a licence and had submitted an application in that behalf and had since that date continued to submit fortnightly returns of receipts and sales of foodgrains regularly. He also submitted that he had "made efforts for two months to get the licence" and the Inspector had assured him from time to time that he (the appellant) "need not worry and the licence would be sent to him at his residence". This clearly amounts to an admission that the appellant knowingly carried on business as a dealer without a licence. It is true that he carried on the business as a dealer in the expectation based on assurances given to him by the Inspector that a licence will be issued to him, but in carrying on the business as a dealer he contravened section 3 of the Order, because he held no licence. The authorities under the Order are not bound to issue a licence merely because it is applied for, nor is there any provision in the Order, as is to be found in certain statutes relating to administration of Municipalities, that permission shall be deemed to be issued if for a period specified in the statute no reply is given by the prescribed authority to an application for grant of permission.

On the facts found, I am of the opinion that the appellant had contravened section 3 of the Order with the knowledge that he did not hold a licence. But there can be no doubt that the State authorities acted negligently; they did not give the appellant a hearing before rejecting his application for a licence, and did not even inform him about its rejection. They continued to accept the returns submitted by him from time to time, and there is no reason to disbelieve the statement of the appellant that the Inspector had given him assurances from time to time that a licence would be issued to him. I am therefore of the view that no serious view of the contravention of the provisions of the Madhya Pradesh Foodgrains Dealers Licensing Order, 1958, may be taken, and a fine of Rs. 50 would meet the ends of justice. The order forfeiting the stocks of foodgrains must be set aside.

ORDER OF THE COURT.—Following the judgment of the majority, the appeal is allowed, the order of the High Court convicting the appellant is set aside and the appellant is acquitted of the offence with which he was charged. The bail bond is discharged. If any fine has been paid, it shall be returned.

K.S.

Appeal allowed.

THE SUPREME COURT OF INDIA

(Civil Appellate Jurisdiction)

PRESENT — K. SUBBA RAO, J. C. SHAH AND R. S. BACHAWAT, JJ

Nirmala Bala Ghose and another

Appellants*

v

Balai Chand Ghose and others

Respondents

Hindu Law—Religious endowment—Deed dedicating properties to a religious institution or deity—Construction—Dedication if partial or absolute—Determination of—Rule and considerations—Reasonable provision for maintenance and residence of shebais and their descendants—If inconsistent with absolute dedication

Civil Procedure Code (V of 1908) Order 41, rule 33—Power of appellate Court under—When may be properly invoked

Where there is a deed of dedication dedicating properties to a deity the question whether it creates an absolute or partial dedication must be settled by a conspectus of all the provisions of the deed. If the property is wholly dedicated to the worship of the idol and no beneficial interest is reserved to the settlor, his descendants or other persons the dedication is complete. If by the deed what is intended to create is a charge in favour of the deity and the residue vests in the settlor the dedication is partial.

A reasonable provision for remuneration, maintenance and residence of the shebais does not make an endowment bad. For ever when property is dedicated absolutely to an idol and no beneficial interest is reserved to the settlor, the property is held by the deity only in an ideal sense. The possession and management of the property must, in the very nature of things, be entrusted to a shebai or manager and nomination of the settlor himself and his heirs as shebais with reasonable remuneration out of the endowed property with right of residence in the property, will not invalidate the endowment. Thus a provision for maintenance and residence of the shebais cannot be interpreted as restrictive of the estate of the deity. A provision for the benefit of persons other than the shebai or a direction for accumulation of income may not be valid if it infringes the rule against perpetuities or accumulation or rules against impermissible restrictions but that does not affect the validity of the endowment. The beneficial interest in the provision found invalid reverts to the deity or the settlor according as the endowment is absolute or partial. If the endowment is absolute and a charge created in favour of other persons or the direction for accumulation is invalid the benefit will enure to the deity and not revert to the settlor or his heirs.

If provision for residence of the shebai can be made under a deed of endowment without affecting its validity, a provision whereby the shebai will be entitled to use the land belonging to the deity at specially low rates may not by itself amount to an impermissible reservation by the settlor.

From the fact that the income of the endowed properties is expanding and the expenses are static leaving a substantial residue, it cannot be inferred that the settlor intended to create a mere charge and not an absolute dedication in favour of the deity. The question is always one of intention of the settlor to be determined from a review of all the dispositions under the deed of settlement.

It would be inexpedient to construe the terms of one deed by reference to the terms of another or to lay down general rules applicable to the construction of settlements varying in terms. In construing a deed the Court has to ascertain the intention of the settlor and for that purpose to take into consideration all the terms thereof. If on a review of all the terms it appears that after endowing property in favour of a religious institution or a deity, the surplus is either expressly or by implication retained with the settlor or given to his heirs a partial dedication may readily be inferred, apparently comprehensive words of the disposition in favour of the religious endowment notwithstanding.

The terms of the deed of dedication in the instant case, however, disclose a clear intention that the entire property was to belong to the deity and no one else had beneficial interest or title thereto. The shebais and their descendants are given a certain interest in the property, but that direction does not cut down the absolute interest conveyed to the deity, nor can it be interpreted as reserving a beneficial interest in favour of the settlor or his heirs. The direction operates to create a charge upon the estate of the deity and not to reduce the estate itself to a charge. The property is dedicated absolutely for the *deb seva* of the deity and the direction for accumulation of the income does not affect the validity of the dedication.

Per majority.—Order 41, rule 33 of the Civil Procedure Code is undoubtedly expressed in terms which are wide, but it has to be applied with discretion and to cases where interference in favour of the appellant necessitates interference also with a decree which has by acceptance or acquiescence become final so as to enable the Court to adjust the rights of the parties. Where in an appeal the Court reaches a conclusion which is inconsistent with the opinion of the Court appealed from and in adjusting the right claimed by the appellant it is necessary to grant relief to a person who has not appealed, the power, conferred by Order 41, rule 33 may properly be invoked. The rule, however, does not confer an unrestricted right to re-open decrees which have become final merely because the appellate Court does not agree with the opinion of the Court appealed from.

When a party allows a decree of the Court of first instance to become final, by not appealing against the decree, it would not be open to another party to the litigation, whose rights are not otherwise affected by the decree (as in the instant case), to invoke the powers of the appellate Court under Order 41, rule 33, to pass a decree in favour of the party not appealing so as to give the latter a benefit which he has not claimed. Order 41, rule 33 is primarily intended to confer power upon the appellate Court to do justice by granting relief to a party who has not appealed, when refusing to do so would result in making inconsistent, contradictory or unworkable orders.

By majority (Bachawat J., dissenting).—In the instant case the appellant is not entitled to challenge the decree passed by the lower Court against the deities holding that the deed of dedication made in favour of the deities created only a partial debuttar and not an absolute debuttar, as she does not represent the deities.

*Per Bachawat, J. :—*It is true that the deities were represented by independent guardians *ad litem* for the purposes of this litigation. But the appellant is one of the joint *shebait*s of the deity and as such, she has a right to assail the decree of the lower Court. Moreover, it is well settled that a *shebait* right is a right of property. This right is affected by the declaration that the deed of dedication created a partial and not absolute debuttar. The *shebait* right in an absolute debuttar is certainly different from the *shebait* right in a partial debuttar. The appellant is therefore aggrieved by the decree of the lower Court and is entitled to challenge it in appeal.

Appeals from the Judgment and Decrees, dated 23rd September, 1959 of the Calcutta High Court in Appeals from Original Decrees Nos. 268 to 270 of 1957.

S. V. Gupte, Solicitor-General of India (*A. K. Sen* and *D. N. Mukherjee*, Advocates, with him), for Appellants (In all the Appeals).

A. V. Viswanatha Sastri, Senior Advocate (*S. C. Majumdar*, Advocate, with him), for Respondent No. 1.

The Judgments of the Court were delivered by

Shah, J. (for *Subba Rao, J.*, and himself)—This group of appeals arises out of Suits Nos. 79 and 80 of 1954 and 67 of 1955 filed by the first respondent Balai Chand Ghose (who will hereinafter be called “Balai”) in the Court of the Eighth Subordinate Judge, Alipore, District 24 Parganas, West Bengal. In suits Nos. 79 and 80 of 1954 Balai prayed that he be declared owner of the properties described in the schedules annexed to the respective plaints. In Suit No. 67 of 1955 he claimed that it be declared that his wife Nirmala, is a *benamidar* for him and that the deed of dedication dated 15th September, 1944 did not amount to an absolute dedication of the properties in suit to the deities Sri Satyanarayan Jiu and Sri Lakshminarayan Jiu and that the plaintiff is the sole *shebait* of the two deities. The Trial Court decreed Suits Nos. 79 and 80 of 1954 holding that the plaintiff was the owner of the disputed properties and the deed of endowment Exhibit 11 (a) executed on 8th March, 1939 by Nirmala was “sham and colourable”. In Suit No. 67 of 1955 the Subordinate Judge declared that Nirmala was a *benamidar* of Balai of the properties in suit and the deed of endowment dated 15th September 1944, Exhibit 11, did not amount to absolute dedication of the properties to the deities Sri Satyanarayan Jiu and Sri Lakshminarayan Jiu.

The High Court of Judicature at Calcutta, in exercise of its appellate jurisdiction, modified the decrees passed by the Trial Court. The High Court held that the deed Exhibit 11 (a) was not sham, but it amounted to a partial dedication in favour of the deity Sri Gopal Jiu i.e., it created a charge on the properties endowed

for the purposes of the deity mentioned in the deed. The decree passed in Suit No 67 of 1955 from which Appeal No 269 of 1957 arose was dismissed subject to the "clarification or clarifications" that it created only a charge in favour of the deity or deities for the purposes recited therein and that subject to the charge, the properties belonged to Balai. With certificate of fitness granted by the High Court, these three appeals have been preferred.

The facts which give rise to these appeals are these. By his first wife, Balai had two sons, Paresh and Naresh. After the death of his first wife, Balai married Nirmala, who bore him four sons, Suresh, Jogesh, Ramesh and Bhambesh. In 1954 Balai contracted a third marriage and that gave rise to quarrels between Nirmala and Balai. In 1919 Balai had purchased a house at No 2 A, Sarbadhikari Lane in the town of Calcutta and was living in that house with Nirmala. He installed in that house a family deity named Sri Gopal Jiu. On 13th June, 1930 seven cottahs of homestead land comprising premises Nos 155 and 155 A (now Nos 155 and 154 2), Beliaghata Main Road, Calcutta, with buildings standing thereon were purchased by Balai in the name of Nirmala for Rs 20 000. On 30th July, 1937, two bighas and two cottahs of homestead land being the eastern portion of premises No 153, Beliaghata Main Road, Calcutta were purchased for Rs 15,000 also in the name of Nirmala. On 1st June, 1938 a house at 1-B Sarbadhikari Lane was purchased in the name of Nirmala for Rs 7 000. On 8th March, 1939 a deed of endowment Exhibit 11 (a) styled 'Arpannama' (material clauses whereof which have a bearing on the dispute raised in two of these appeals will be presently set out) was executed by Nirmala dedicating premises Nos 155 and 154 2, Beliaghata Main Road, to Sri Gopal Jiu. On 4th December, 1940, premises No 13, Beliaghata Road, comprising 4 bighas 11 chittaks and 14 sq ft of land with a building standing on a part thereof were purchased for Rs 42,500 in the name of Nirmala and extensive additions and alterations were made in the building shortly thereafter. Balai and Nirmala moved into the new house at No 13, Beliaghata Main Road. Sri Gopal Jiu was shifted from the Sarbadhikari Lane to the new house in premises No 13, Beliaghata Main Road, and two deities Sri Satyanarayan Jiu and Sri Lakshminarayan Jiu were installed in the new house. By deed of dedication Exhibit 11 dated 15th September, 1944, executed by Balai and Nirmala, three properties—premises Nos 13, Beliaghata Main Road, 1-B Sarbadhikari Lane and 37, Sura First Lane—were dedicated for the benefit of Sri Satyanarayan Jiu and Sri Lakshminarayan Jiu. After 1947, on parts of the open land on premises No 13, four houses were constructed and a part of the land was let out by Balai.

On 22nd September, 1954, Balai filed Suit No 79 of 1954 claiming a declaration that he was the owner of premises No 153 Beliaghata Main Road. On the same day, he filed another suit No 80 of 1954 claiming a declaration that he was the owner of premises Nos 155 and 154 2. To both these suits Nirmala and Sri Gopal Jiu represented by Nirmala, were impleaded as party defendants. Balai filed a third suit—No 67 of 1955—for a declaration that Nirmala was his *benamidar* in respect of the properties described in the plaint and that by the deed of endowment dated 15th September, 1944 there was no absolute dedication in favour of Sri Satyanarayan Jiu and Sri Lakshminarayan Jiu, but the property was charged for worship and for a declaration that he was the sole *shebait* of the deities. To this suit the two deities represented by one Sumi Sekhar Bhattacharjee were impleaded as defendants 1 and 2. Nirmala was impleaded as the third defendant.

It was the case of Balai in Suits Nos 79 and 80 of 1954 that the deed Exhibit 11 (a) dated 8th March, 1939 executed by him dedicating the properties to Sri Gopal Jiu was a "sham and nominal" transaction and that he was and remained the owner of the properties and was in possession thereof. In Suit No 67 of 1955 it was not the case of Balai that the deed of dedication was simulate, his case was that under the deed Exhibit 11 a charge was created for purposes set out therein in favour of the two deities and subject to that charge he was the owner of the properties endowed.

Suits Nos. 79 and 80 of 1954 were resisted by Nirmala on behalf of herself personally and as representing the deity Sri Gopal Jiu. She contended that premises Nos. 153, 155 and 154-2 were acquired by her with the aid of funds gifted to her by her husband Balai and the acquisition was not made *benami* for Balai, that in any event Balai was bound by the deed dated 8th March, 1939, that the deed of endowment dedicating the properties to the deities was not "colourable or sham," and that since the date of dedication the deity was in possession. Balai could not claim a declaration that he was the owner of the property. In Suit No. 67 of 1955 Nirmala contended that she had purchased the three properties in suit with her own *stridhan* funds and that she was not a *benamidar* for Balai that the allegations made by Balai that he was in possession was false, that the endowment made on 15th September, 1944 was an absolute *debttar* transferring the ownership to the deities absolutely, that Balai was neither the sole *shebait* nor the owner of the properties and that the deities were the owners thereof. It was contended on behalf of the deities that there was an absolute endowment created by the deed Exhibit 11 and that the deities were the owners of the properties endowed by the deed.

The Subordinate Judge held that the deed Exhibit 11 (a) was "a sham and colourable transaction," that it was never acted upon by the parties and that Balai was entitled to the declaration claimed by him. In Suit No. 67 of 1955 he held that by the deed Exhibit 11 the properties settled were charged for the *Seba-puja* of Sri Satyanarayanan Jiu and Sri Lakshminarayan Jiu, and of the residue Balai was the owner. He accordingly decreed Suits Nos. 79 and 80 of 1954 declaring Balai to be the owner of the properties in suit. He also decreed Suit No. 67 of 1955 declaring that the properties in dispute therein were only charged with *Seba-puja* of the deities. In Appeals Nos. 268 and 270 of 1957 against the decrees in Suits Nos. 79 and 80 of 1954 by Nirmala and Sri Gopal Jiu, the High Court of Calcutta held that the deed Exhibit 11 (a) was a "valid and effective dedication" which created a partial dedication in favour of the deity Sri Gopal Jiu for purposes of the deity as set out in the deed. In Appeal No. 269 of 1957 from the decree in Suit No. 67 of 1955 the High Court affirmed the view of the Trial Court that by the deed Exhibit 11, subject to the direction that the *Seba-puja* of Sri Satyanarayan Jiu and Sri Lakshminarayan Jiu will be carried on, the properties will stand charged for the various purposes and expenses mentioned in the deed. The High Court issued a consolidated direction in the two sets of appeals that the Subordinate Judge will, on application by the parties interested, ascertain "all the charges and the amounts and the other details mentioned in the two deeds Exhibits 11 and 11 (a)" and make a suitable provision for the temple or the location of the respective deities and also for the *Shebait's* residence in terms of the dedication and the temple or temples and the *Shebait's* residence and dispose of the suits by passing appropriate final decrees. The High Court directed :

"In working out the charges etc., as aforesaid, for giving effect to the purposes of the two deeds of dedication [Arpannamas Exhibits 11 and 11 (a)] the learned Subordinate Judge will make suitable provision for the temple or temples for the location of the respective deities and also for the *Shebait's* residence in terms of the said Arpannamas and the temple or temples and the *Shebait's* residence so provided, will be absolute *Debttar* in the light of the decision of *Sri Sri Iswari Bhuvaneshwari Thakurani's case*¹ as, so far as that matter is concerned, in view of the aforesaid authority, that alone is the proper way to give effect to the purpose of the afore mentioned two deeds of dedication [Exhibits 11 and 11 (a)] and the charges, created thereunder."

The appellant Nirmala does not, in these appeals, challenge the finding that she was a *benamidar* for Balai in respect of the properties purchased under the deeds dated 13th June, 1930 and 30th July, 1937 and 4th December, 1940, that the properties belonged to Balai and that the real executant of the deed Exhibit 11 was Balai. The only plea advanced by Nirmala is that by the two deeds Exhibits 11 (a) and 11 an absolute and not a partial dedication in favour of the deities was intended. For reasons, which we will presently set out, it is unnecessary to consider the appellant's plea in respect of the properties endowed under the deed Exhibit 11.

We may briefly set out the terms of the deed Exhibit 11 (a). It is described as a deed of dedication in respect of immovable properties valued at Rs. 20,000

1. L.R. 64 I.A. 203, affirming on appeal I.L.R. 60 Cal. 54.

for the *Seba* of the deity. After describing the properties it is recited that the settlor was in possession and enjoyment of the properties and that she dedicated the properties for *Deb Seba*. The deed then recites that the settlor had been carrying on the *Seba* of Sri Gopal Jiu installed by her husband, and that the properties dedicated by her husband were not sufficient for satisfactorily carrying on the *Seba* of Sri Gopal Jiu for ever and for perpetuating the names of her father in law and mother in law and for carrying on the work of worship of the deity of Sri Gopal Jiu regularly for ever, the provisions then set out were made. The deed proceeds to state

' I dedicate the abovementioned two properties more fully described in the schedule below in order that the daily and periodical *Seba* etc. of the said Sri Sri Gopal Thakur installed by my husband may go on regularly. From this day the said two properties become the *Debutter* properties of the said deity Sri Sri Gopal Jiu Thakur and they vest in it in a state absolutely free from encumbrances and defects. The said deity Sri Sri Gopal Jiu becomes the full owner of the said two properties. As to this neither I nor any of my heirs and legal representatives in succession shall raise or be entitled to lay any claim or demand at any time and even if it be done it shall be wholly void and rejected.

Then the deed directs that "one good temple and ornaments worth approximately Rs. 500 for Sri Gopal Jiu Thakur will be made out of the income of the *Debutter* properties of Sri Gopal Jiu Thakur and on the temple being constructed the deity will be installed and established therein and the expenses for worship etc. and entertaining Brahmins and other expenses in connection with the ceremony shall be met out of the income of the *Debutter* properties of Sri Gopal Jiu Thakur.' To meet expenses for the worship of the deity the properties described in the schedule, it was directed, will be let out on rent and all the expenses of the deity will be defrayed out of the rents, that the *Shebait* shall maintain proper accounts of the income and expenditure and deposit in the deity's fund any surplus repair the houses yearly, pay municipal taxes etc., and out of the accumulations from the surplus income purchase immovable properties in the name of the deity and with the income erect a house at 153 Behaghata Main Road and deposit the rent from that house in the *Debutter* fund. The deed gives detailed directions with regard to succession to the *shebaitship*. By the deed Nirmala and her husband Balai were constituted joint *shebait*s and it was directed that after Nirmala's death Balai shall be the *shebait*, and after his death his two sons Paresb and Naresh will become *Shebait*s of the deity. The settlor expressed the hope that the *Shebait*s and their lineal descendants will live in the same mess as members of the family and directed that any one who separated in mess will not be entitled to be a *Shebait* of the deity, but if they separated in mess for want of accommodation "out of their own accord and being unanimous," and all the properties remain joint, they shall be entitled to remain *shebait*s. On the death of the two sons, Paresb and Naresh their sons will become *shebait*s in accordance with the shares of their respective fathers in the *shebaitship*, and if any of the sons have more than one son then all such sons will together get their father's turn of worship and will act in accordance with the terms of the deed and carry on the worship of the deity and that in the absence of sons' sons, the settlor's great grandsons will be appointed *Shebait*s and they will protect the *Debutter* property. The deed then directs that the daily *Seba* will be carried on in the same manner prescribed in the deed of dedication relating to the *Debutter* created by Balai and the daily and periodical expenses for the worship of the deity will be met out of the *Debutter* properties dedicated by Balai. Provision was then made that on the occasion of each of the festivals of *Jannamas*, *Rajatra* and of Sri Gopal Jiu Thakur a sum of Rs. 101 will be spent by the *Shebait*s for entertaining Brahmins and the poor. A monthly remuneration of Rs. 25 is provided for the person who acts as a *Shebait* and it is directed that so long as the sons shall remain *Shebait*s in joint mess, they will get, for the expenses of their common family expenses four maunds of rice, two maunds of flour per month and Rs. 2 per day for daily expenses. An additional amount of Rs. 10 per month is directed to be spent on the *Sankranti* day i.e., on the last day of each month and Rs. 51 on the occasion of *Suvaratri* out of the *Debutter* estate. All these expenses it is directed are to be met out of the house rents and the monthly *Teca* rent of the lands of the Bustee of the *Debutter* properties, but the *Shebait*s are not entitled to let out the house or land in permanent rights to any one nor are they entitled to mortgage, make a gift of, sell, encumber

or transfer the same in any other manner, and if there be no tenant in the house or the rent of the Bustee be not realised, the expenses of the deities will be reduced and the *Shebait*s will get reduced remuneration proportionately. Provision is made for the devolution of the office of *Shebait*. Descendants in the female line are excluded from *shebaitship*, until the entire male line is extinct. Provision is also made for application of the compensation received for *Debottar* property; it is directed that out of the amount of compensation immovable properties will be purchased by the *Shebait*s in the name of the deity or the amount will be invested in Government paper in the name of the deity, and out of the interest thereof disbursements directed in the deed will be made. The deed then directs that the surplus amount remaining after meeting the cost of worship will be accumulated. The *Shebait*s are prohibited from residing in or otherwise using the houses appertaining to the *Debottar* estate and it is directed that if any one resides or uses it, he will remain bound to pay proper rent. Paragraph 12 of the deed then provides:

"If in future the *Shebait*s be in want of rooms for their residence then each of them will take three Cottahs of lands within the Bustee No. 153, Belghata Main Road beginning from the southern extremity and after erecting houses thereon at his own expense will continue to enjoy and possess the same down to his sons, sons' sons and other heirs in succession on payment of a rent of Rs. 2 per Cottah per month to the *Debottar* estate and will pay for taxes, rents and repairs, etc., of the said house from their respective funds."

In the event of any *Shebait* dying sonless after constructing a house, his widow will be entitled during her lifetime to reside in the house and will also be entitled to get food and Rs. 5 per month as expenses. The deed then again states:

"Be it stated that no one will at any time be entitled to make gift, sale or transfer in respect of the house built in the said Bustee. The said house will form a part of the *Debottar* estate and the *Shebait* will only remain in possession of the same."

Finally, the deed states that to the effect stated in the deed the settlor gives to Sri Iswar Gopal Jiu Thakur installed by her husband "the properties, etc. mentioned in the schedule below".

In the preamble as well as in the operative part of the deed, it is stated that the settlor has dedicated the properties described in the schedule to the deed for the purpose of carrying on the worship of Sri Gopal Jiu Thakur. The deed expressly recites that the properties have, by the deed of dedication, become the properties of the deity and they vest in the deity absolutely free from all encumbrances, and that no other person has any right therein. The deed undoubtedly contains some inconsistent directions, but the predominant theme of the dedication is that the estate belongs to the deity Sri Gopal Jiu and that no one else has any beneficial interest therein.

The plea raised by Balai in the two suits was that the deed of dedication Exhibit 11 (a) was "a mere colourable one and was never acted upon" and that by the deed a cloud was "cast on" his title. The Trial Court accepted the plea. The High Court held that the deed was valid, but thereby only a partial dedication was intended. That there is a genuine endowment in favour of the deity Sri Gopal Jiu is now no longer in dispute. The only question canvassed at the Bar is whether the dedication is partial or complete. Balai contends that it is partial; the deity represented by Nirmala contends that it is absolute. Where there is a deed of dedication, the question whether it creates an absolute or partial dedication must be settled by a conspectus of all the provisions of the deed. If the property is wholly dedicated to the worship of the idol and no beneficial interest is reserved to the settlor, his descendants or other persons, the dedication is complete; if by the deed what is intended to create is a charge in favour of the deity and the residue vests in the settlor, the dedication is partial. Counsel for Balai contends that notwithstanding the repeated assertions in the deed of dedication that the property was endowed in favour of Sri Gopal Jiu and that it was of the ownership of the idol, the deed contained diverse directions which indicated that the dedication was intended to be partial. Counsel relied upon the following indications in the deed in support of the contention:

(1) A hereditary right was granted to the lineal descendants of the settlor in the male line to act as *Shebait*s, and provision was made for their residence, maintenance and expenses. This was not restricted to the *Shebait*s only but enured for the benefit of the members of the *Shebait*s' families.

(2) The income of the endowed property was in excess of the amounts required for the expenses of the deity. The expenses of the deity were, it was contended, static, whereas the income was expanding, leaving a large surplus undisposed of. Provision was made for reducing the expenses of the deity in the event of the income of the property contracting.

(3) The deed was supplementary to another deed executed by Balai for the benefit of the deity, and the expenses of the deity were primarily to come out of the property endowed under that deed.

(4) Direction for accumulation of income of the property endowed, and other properties which may be acquired without any provision for disposal of the accumulation disclosed an intention on the part of the settlor to tie up the property in perpetuity for the benefit of the male descendants subject to a fixed charge in favour of the deity.

We do not propose to express any opinion on the validity or otherwise of the directions under which provision for accumulation of income is made or benefit is given to persons other than the *Shebais* are concerned. This enquiry is only directed to the question whether on the assumption that the directions are valid they indicate an intention on the part of the settlor to create merely a charge on the estate endowed, reserving the beneficial interest in the settlor or her heirs.

A reasonable provision for remuneration, maintenance and residence of the *Shebait* does not make an endowment bad for even when property is dedicated absolutely to an idol, and no beneficial interest is reserved to the settlor, the property is held by the deity in an ideal sense. The possession and management of the property must, in the very nature of things, be entrusted to a *Shebait* or manager, and nomination of the settlor himself and his heirs with reasonable remuneration out of the endowed property with right of residence in the property will not invalidate the endowment. A provision for the benefit of persons other than the *Shebait* may not be valid, if it infringes the rule against perpetuities or accumulations or rules against impermissible restrictions, but that does not affect the validity of the endowment. The beneficial interest in the provision found invalid reverts to the deity or the settlor according as the endowment is absolute or partial. If the endowment is absolute, and a charge created in favour of other persons is invalid, the benefit will enure to the deity, and not revert to the settlor or his heirs.

Evidence about the income of the endowment in favour of Sri Gopal Jiu is somewhat vague and indefinite. The deed of endowment executed by Balai for the deity to which the present deed Exhibit 11 (a) is supplementary is not before the Court and there is on the record no evidence about the income from that endowment and the directions made thereunder. The defect in the record is directly traceable to the nature of the plea raised by Balai in the Court of first instance. He had pleaded that the endowment Exhibit 11 (a) made by his wife Yamala was a "sham transaction", and was not intended to create any interest in the deity, it was not the case of Balai that the endowment though valid was partial and created a mere charge upon the property in favour of the deity. Suits Nos 79 and 80 of 1954 were tried with Suit No 67 of 1955 and the question whether the endowment in favour of Sri Gopal Jiu was partial or absolute appears to have been raised without any pleading in the former suits. There is however, some evidence on this part of the case to which our attention has been invited and on which the argument to support the decree passed by the High Court is founded by Counsel for Balai. Under the deed of dedication Exhibit 11 (a) one good temple and ornaments worth approximately Rs 500 are to be provided for out of the property endowed. *Janmashtami*, *Rasjatra* and other festivals are annually celebrated and in respect of each of these festivals Rs 101 are to be expended. The *Shebait's* remuneration is fixed Rs 25 per month and for the benefit of the family of the *Shebait* four maunds of rice, two maunds of *Atta* and a sum of Rs 2 per day for the daily expenses are provided. For performing the *Seba* of Sri Satyanarayan Jiu on *Sankranti* day every month Rs 10 have to be spent, and Rs 51 have to be spent on the *Sivaratra* day. Provision has been made for paying Rs 2 per month to a pious widow of the family for helping in the *Puja* and to a widow of a *Shebait* expenses at the rate of Rs 5 per

month have to be paid. In the aggregate, these would amount to Rs. 2,400 per annum at the rates prevailing 1939.

Income at the date of the endowment from the *Bustee* land 153/1 was estimated by Nirmala to be Rs. 50 per month, and income from the house Nos. 155 and 154/2 was estimated at Rs. 200. There is no clear evidence about the Municipal or other taxes, rent collection expenses and repairs. But on the materials found on the record, the plea that the income of the properties was largely in excess of the total expenses to be incurred cannot be accepted. The settlor had provided that if a *Shebait* is unable to reside in the house, he will be entitled to get a plot of land out of premises No. 153 at the rate of Rs. 2 per month: whether this rent was nominal or real, need not be investigated. If provision for residence of the *Shebait* can be made under a deed of endowment without affecting its validity, a provision whereby the *Shebait* will be entitled to use the land belonging to the deity at specially low rates may not by itself amount to an impermissible reservation by the settlor. The plea that this was a simulate endowment has been abandoned by Balai. Assuming therefore that the charge for rent to be levied from the *Shebait*s as monthly rental was nominal, the validity of the deed of dedication will not on that ground be affected. User of land in future by the *Shebait*s for erecting houses will undoubtedly reduce the land available for letting out at market rates. If the annual income of the deity was Rs. 3,000, per annum, and some income under the deed of endowment executed by Balai, and the outgoings were Rs. 2,400 beside taxes, collection charges for rents and the expenses for repairs, it would be reasonable to hold that there was not much disparity between the total income which the deity received in 1939 and the estimated outgoings. The fact that on account of the pressure on land increasing in the town of Calcutta, the rentals of immovable property may have gone up later, will be irrelevant in deciding whether a substantial residue was not disposed of by the deed. The direction in paragraph 6 of the deed that in the event of the rent not being realised, the expenses of the deity will be proportionately reduced and there will be proportionate reduction in the remuneration to be paid to the *Shebait*s also acquires significance.

Whether the provision for accumulation of income of the endowment is valid, does not call for determination in this case. If there is an absolute dedication, but the direction for accumulation is invalid, the benefit of the income will enure for the benefit of the deity without restriction: the income will not revert to the settlor.

The High Court observed that the deed commenced with what purported to be an absolute dedication to the deity, but it was clear that the expenses, for the *Seba-Puja* and other expenses of the deities under the deed were not of an expanding character, there being specific recitals in the deed which indicated that the dedication was merely supplementary to the earlier deed of endowment by Balai for the *Seba-Puja* etc., of the deity. The High Court observed:

"As a matter of fact there was specific recital in the deed itself, which indicated that it was merely to be supplementary to the earlier Debutter deed of the husband Balai Chand Ghose, for the purpose of enabling the said *Sheba Puja* etc., to be carried on regularly and in a satisfactory manner. The expenses are practically all mentioned in the deed itself and however elaborate they may be, having regard to the nature of the properties and the estimate of the income, as appearing in the evidence before us, * * * difficult to hold that any large part of the said income would be spent on those expenses. This undoubtedly, is a strong test in favour of holding that what * * * was merely the creation of a charge for, those expenses out of the properties, mentioned in the Schedule to the deed. Moreover under this deed [Exhibit 11 (a)] (*vide* clause 3) so far as the daily and periodical *Shebas* were concerned their expenses, or at least, the daily *Sheba* expenses, both fixed and occasional, * * * were to be met out of the husband's (Balai Chand's) earlier Debutter thus leaving practically not much pressure upon the properties covered by this deed, [Exhibit 11 (a)], it is true that in several places of this deed Exhibit 11 (a), reference has been made to the income of the Debutter estate or advantages to the Debutter estate or investment in the Debutter estate, but they all, in the context, can be read as referring to the Debutter estate, which was created by the dedication in question, namely, the partial Debutter or the charge which was created in favour of the particular deity. Where a charge is created and a dedication is made, it will not be inappropriate to refer to the dedicated properties as Debutter, though only for the limited purpose of providing for that charge. That, indeed, is the meaning of partial dedication, as understood in Hindu law. The mere use of the word 'Debutter' would not necessarily constitute a particular endowment an absolute Debutter. On the same principle and in same context, the payment of rent by the *Shebait*s, occupying particular portion of the dedicated properties for purposes of their residence, may also be explained. As a matter of fact on a reading of the entire deed, in the light of the

circumstances of this case and upon a full consideration of the same we are inclined to hold this deed Exhibit 11 (a) upon its true construction did not create an absolute Debutter but created only a charge in favour of the deity Sri Sri Gopal Jiu named therein for the various services and other necessities referred to in several paragraph of the said deed Exhibit 11 (a)

The High Court opined that because the income of the endowed properties was large and was capable of continuous expansion, and the expenses for the purposes of the deity were fixed, it may be inferred that the settlor intended to create a mere charge and not an absolute dedication in favour of the deity. In support of this proposition, the High Court placed strong reliance upon the judgment of the Judicial Committee in *Surendrakshau Roy v Doorgasundari Dassee and another*¹. In that case Rajah Bjoykeshav Roy bequeathed by his will property to a Thakur, to secure proper performance of the *Sheba* and other ceremonies, and directed his two widows each to adopt a son, both of such sons being appointed *Shebais*, subject to the control of the widows during their minority with monthly allowance from the surplus income. The residue was not disposed of. Before the Judicial Committee it was urged that all the property had been devised under the will of the Raja to the deity and the heirs of the settlor had become *Shebais* and were merely entitled to manage the property in the usual way. In dealing with that contention the Judicial Committee observed at page 127

'It is true that by the first sentence of the will all is given to the Thakoor and though in the plaint the question is mooted whether the gift is made *bona fide* (and of course such gifts may be a mere scheme for making the family property inalienable) it has not been really disputed. Nor indeed could it well be disputed in this case. For the last part of the will shews clearly enough that the income was to be applied first in performing the *sheba* of the Thakoors who is mentioned as the object of the gift and of other family Thakoor and in meeting the prescribed monthly allowances and in performing the daily and fixed rites and ceremonies as they are now performed and met. The testator must have been well aware that after all these charges had been met there would be a very large surplus. In fact he directs that out of the surplus each adopted son shall receive Rs 1000 monthly, but of the residue after that he says nothing.

There is no indication that the testator intended any extension of the worship of the family Thakoors. He does not as is sometimes done, admit others to the benefit of the worship. He does not direct any additional ceremonies. He shews no intention save that which may be reasonably attributed to a devout Hindu gentleman viz to secure that this family worship shall be conducted in the accustomed way by giving his property to one of the Thakoors whom he venerates most. But the effect of that when the estate is large is to leave some beneficial interest undisposed of and that interest must be subject to the legal incidents of property.

But the judgment does not lay down any rule that where the income is expanding and the expenses are static, leaving a substantial residue, it must be presumed, notwithstanding the comprehensive and unrestricted nature of the disposition, that the settlor intended to create only a charge in favour of the deity. The question is always one of intention of the settlor to be determined from a review of all the dispositions under the deed of settlement.

In *Sri Sri Iswari Bhubaneswari Thakurani v Brajmath Dey and others*², certain properties were dedicated by two brothers to a domestic deity and it was directed that the right of *Sheba* should go to their male heirs by primogeniture. In dealing with a dispute whether under the deed of settlement, there was an absolute dedication to the deity, the Judicial Committee observed at page 211

The dedication is not invalidated by reason of the fact that members of the settlor's family are nominated as *shebais* and given reasonable remuneration out of the endowment and also rights of residence in the dedicated property. In view of the privileges attached to dedicated property it has not infrequently happened, as the Law Reports show that simulate dedications have been made, and a close scrutiny of any challenged deed of dedication is necessary in order to ascertain whether there has been a genuine divestiture by the settlor in favour of the idol. The dedication moreover may be either absolute or partial. The property may be given out and out to the idol or it may be subjected to a charge in favour of the idol. The question whether the idol itself shall be considered the true beneficiary or subject to a charge in favour of the heirs or specified relatives of the testator for their upkeep or that or the other hand these heirs shall be considered the true beneficiaries of the property subject to a charge for the upkeep worship and expenses of the idol is a question which can only be settled by a construction of the entire provisions of the will. *Pande Har Naayari v Surja Kunvari*³. It is also of importance to consider the extent of the property alleged to be dedicated in relation to the expense to be incurred and the ceremonies to be observed in the worship of the idol. The purposes of the dedication may be directed to expand as the income increases or the purposes may be prescribed in a

1 (1892) L.R. 19 I.A. 103

2 (1937) L.R. 64 I.A. 203 (1937) 2 M.L.J.

527

3 L.R. 43 I.A. 143

ting terms so that if the income increases beyond what is required for the fulfilment of these purposes it may not be protected by the dedication."

In a recent judgment of this Court in *Sree Sree Ishwar Sridhar Jew v. Sushila Bala Dasi and others*¹, it was observed that the question whether the idol itself is the true beneficiary subject to a charge in favour of the heirs of the testator, or the heirs are the true beneficiaries subject to a charge for the upkeep, worship and expenses of the idol, has to be determined by a conspectus of the entire deed or will by which the properties are dedicated and that a provision giving a right to the *Shebais* to reside in the premises dedicated to the idol for the purpose of carrying on the daily and periodical worship and festivals does not detract from the absolute character of a dedication to the idol.

It is inexpedient to construe the terms of one deed by reference to the terms of another, or to lay down general rules applicable to the construction of settlements varying in terms. In construing a deed, the Court has to ascertain the intention of the settlor, and for that purpose to take into consideration all the terms thereof. If, on a review of all the terms, it appears that after endowing property in favour of a religious institution or a deity, the surplus is either expressly or by implication retained with the settlor or given to his heirs, a partial dedication may readily be inferred, apparently comprehensive words of the disposition in favour of the religious endowment notwithstanding.

The terms of Exhibit 11 (a) however disclose a clear intention that the entire property was to belong to the deity and no one else had beneficial interest or title thereto. The *Shebais* and their descendants are given a certain interest in the property, but that direction does not cut down the absolute interest conveyed to the deity nor can it be interpreted as reserving a beneficial interest in favour of the settlor or his heirs. The direction operates to create a charge upon the estate of the deity, and not to reduce the estate itself to a charge.

To recapitulate, therefore, the property is dedicated absolutely for the *deb-seba* of the deity: no beneficial interest is reserved to the settlor or his heirs: and the direction for accumulation of the income does not affect the validity of that dedication. Provision for maintenance and residence of the *Shebais* being an ordinary incident of such a dedication cannot be interpreted as restrictive of the estate of the deity. It is unnecessary to decide whether the directions for appropriation of a part of the income for persons other than the *Shebais* may be valid: if it be invalid, the interest will revert to the deity and not to the settlor. It must, therefore, be held that Exhibit 11 (a) creates an endowment for the benefit of the deity absolutely, subject to certain charges in favour of the *Shebais* and the descendants of the settlor.

It is unnecessary, in view of the course which the proceedings in Suit No. 67 of 1955 have taken, to set out the terms of Exhibit 11 executed by Balai and Nirmala on 15th September, 1944. Suit No. 67 of 1955 was filed originally by Balai against the two deities Sri Satyanarayan Jiu and Sri Lakshminarayan Jiu and Nirmala, and Balai sought to represent the two deities. On an objection raised to the constitution of the action by Nirmala, Sunil Sekhar Bhattacharjee was appointed guardian of the two deities for the action. Bhattacharjee filed a written statement denying the claim made by Balai and submitted that the dedication in favour of the deity was absolute. An issue was raised about the nature of the endowment and the Trial Court declared that the endowment was partial and the beneficial interest remained vested in Balai. The trial Court had rejected the case of the deities that there was an absolute dedication, and the guardian for the suit did not challenge that decree on behalf of the two deities. Nirmala appealed and contended that there was an absolute dedication in favour of the deity, but she did not represent the deities and could not raise that claim, unless she got herself formally appointed guardian of the deity by order of the Court. The High Court confirmed the decree passed by the trial Court, subject to certain modifications which are not material.

In this appeal, the two deities are also impleaded as party-respondents, but the deities have not taken part in the proceeding before this Court, as they did not

in the High Court. The decree against the two deities has become final, no appeal having been preferred to the High Court by the deities. It is not open to Nirmala to challenge the decree insofar as it is against the deities, because she does not represent the deities. The rights conferred by the deed Exhibit 11 upon Nirmala are not affected by the decree of the trial Court. She is not seeking in this appeal to claim a more exalted right under the deed for herself which may require re-examination even incidentally of the correctness of the decision of the trial Court and the High Court insofar as it relates to the title of the deities. It was urged however that apart from the claim which Nirmala has made for herself the Court has power and is indeed bound under Order 41 rule 33 Code of Civil Procedure to pass a decree if on a consideration of the relevant provisions of the deed this Court comes to the conclusion that the deed operates as an absolute dedication in favour of the two deities. Order 41 rule 33 insofar as it is material provides:

The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parts although such respondents or parts may not have filed any appeal or objection.

The rule is undoubtedly expressed in terms which are wide but it has to be applied with discretion and to cases where interference in favour of the appellant necessitates interference also with a decree which has by acceptance or acquiescence become final so as to enable the Court to adjust the rights of the parties. Where in an appeal the Court reaches a conclusion which is inconsistent with the opinion of the Court appealed from and in adjusting the right claimed by the appellant it is necessary to grant relief to a person who has not appealed, the power conferred by Order 41 rule 33 may properly be invoked. The rule however does not confer an unrestricted right to reopen decrees which have become final merely because the appellate Court does not agree with the opinion of the Court appealed from.

The two claims made against Nirmala and the deities in Suit No. 67 of 1955 though capable of being joined in a single action were distinct. Against the deities it was claimed that the property was partially dedicated in their favour; against Nirmala it was claimed that she was merely a *benam dar* for the settlor Balai and that she was not a *Shobait* under the deed of settlement. The High Court has passed a decree declaring that dedication in favour of the deities is partial and has further held while affirming her right to be a *Shobait* that Nirmala was merely a *benamidar* in respect of the properties settled by the deed. There was no inconsistency between the two parts of the decree and neither in the High Court nor in this Court did Nirmala claim a right for herself which was larger than the right awarded to her by the decree of the trial Court. In considering the personal rights claimed by Nirmala under the deed Exhibit 11 it is not necessary even incidentally to consider whether the deities were given an absolute interest. There were therefore two sets of defendants in the suits and in substance two decrees though related were passed. One of the decrees can stand apart from the other. When a party allows a decree of the Court of first instance to become final by not appealing against the decree, it would not be open to another party to the litigation whose rights are otherwise not affected by the decree to invoke the powers of the appellate Court under Order 41, rule 33 to pass a decree in favour of the party not appealing so as to give the latter a benefit which he has not claimed. Order 41 rule 33 is primarily intended to confer power upon the appellate Court to do justice by granting relief to a party who has not appealed when refusing to do so would result in making inconsistent contradictory or unworkable orders. We do not think that power under Order 41 rule 33 of the Code of Civil Procedure can be exercised in this case in favour of the deities.

Appeals Nos. 966 and 968 of 1964 must therefore be allowed with costs throughout. It is declared that the properties in deed Exhibit 11 (a) were absolutely dedicated in favour of the deity Sri Gopal Jiu. Suits Nos. 79 and 80 of 1954 will therefore stand dismissed. This will however be without prejudice to the concession made on behalf of Nirmala that she was a *benam dar* of her husband Balai in respect of the properties settled by the deed Exhibit 11 (a). Appeal No. 967 of 1964 will stand dismissed with costs in favour of Balai.

Bachawat, J.:—I agree entirely with what has fallen from my learned brother, Shah, J., with regard to the deed, Exhibit 11 (a), and I agree that the deed creates an endowment for the benefit of the deity absolutely, subject to certain charges in favour of the *Shebait*s and the descendants of the settlor.

With regard to Exhibit 11, my learned brother has held that it is not open to Nirmala Bala to challenge the decree passed in Suit No. 67 of 1955. With the greatest respect for my learned brother, I am unable to agree with this conclusion. The trial Court decreed that the dedication under Exhibit 11 is partial and not absolute, and I think it was open to Nirmala Bala to challenge the decree in the High Court, and on the appeal to the High Court being dismissed, it is open to her to challenge the decree of both the Courts by an appeal to this Court. It is true that the deities were represented by independent guardians *adlitem* for the purposes of this litigation. But Nirmala Bala is one of the joint *Shebait*s of the deity, and as such she has a right to assail the decree.

In *Maharaja Jagadindra Nath Roy Bahadur v. Rani Humanta Kumari Debi*¹, Sir Arthur Wilson observed :

“ But assuming the religious dedication to have been of the strictest character, it still remains that the possession and management of the dedicated property belong to the *shebait*. And this carries with it right to bring whatever suits are necessary for the protection of the property. Every such right of suit is vested in the *shebait*, not in the idol. ”

As a joint *Shebait* of the deity, Nirmala Bala has the right to file this appeal against the decree which declares that the dedication is partial and not absolute. Such an appeal is necessary for the protection of the property of the deity. The other *Shebait* and the deities are parties to the appeal, and I am unable to hold that the appeal is not maintainable at the instance of Nirmala Bala.

Moreover, it is well-settled that a *shebait* right is a right of property. In *The Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*², B.K. Mukherjea, J., observed :

“ It was held by a Full Bench of the Calcutta High Court (*Monahai v. Bhupendra*³, that *Shebait*-ship itself is property, and this decision was approved of by the Judicial Committee in *Ganesh v. Lal Behary*⁴, and again in *Bhabatarini v. Ashalata*⁵. The effect of the first two decisions, as the Privy Council pointed out in the last case, was to emphasise the proprietary element in the *Shebait* right and to show that though in some respect an anomaly, it was an anomaly to be accepted as having been admitted into Hindu law from an early date. This view was adopted in its entirety by this Court in *Angurbala v. Debabrata*⁶. ”

It follows that the *Shebait* right of Nirmala Bala under the deed Exhibit 11 (a) is a right of property. This right is affected by the declaration that the deed, Exhibit 11 (a) created a partial and not absolute *debuttar*. The *shebait* right in an absolute *debuttar* is certainly different from the *shebait* right in a partial *debuttar*. The decree under appeal therefore affects the *shebait* right of Nirmala Bala. She is aggrieved by the decree, and is entitled to challenge it in appeal.

In this view of the matter, I hold that the appeal by Nirmala Bala from the decree in Suit No. 67 of 1955 is maintainable. I would, therefore, have examined the contention of the appellant with regard to Exhibit 11 on the merits, and then disposed of the appeal. But as the majority view is that the appeal is not maintainable, no useful purpose will be served by an examination of the merits of the appellant's case with regard to Exhibit 11.

ORDER of the Court :—Following the judgment of the majority Appeals Nos. 966 and 968 of 1964 are allowed with costs throughout. It is declared that the properties in deed Exhibit 11 (a) were absolutely dedicated in favour of the deity Sri Gopal Jiu. Suits Nos. 79 and 80 of 1954 will therefore stand dismissed. This will, however, be without prejudice to the consession made on behalf of Nirmala that she

1. (1904) L.R. 31 I.A. 203, 210.

740.

2. (1954) S.C.R. 1005, 1018 : (1954) S.C.J.

5. L.R. (1943) 70 I.A. 57 : (1943) 2 M.L.J.

335 : (1954) M.L.J. 596.

70.

3. I.L.R. (1932) 70 Cal. 452.

6. (1951) S.C.R. 1125 : (1951) S.C.J. 394.

4. L.R. (1936) 63 I.A. 448 : 71 M.L.J.

was a *benamidar* of her husband Balai in respect of the properties settled by the deed Exhibit 11 (a) Appeal No 967 of 1964 is dismissed with costs in favour of Balai

V K

Appeals Nos 966 and 968 of 1964 allowed Appeal No 967 of 1964 dismissed

THE SUPREME COURT OF INDIA (Criminal Appellate Jurisdiction)

PRESENT —MR JUSTICE J R MUDHOLKAR, MR JUSTICE R S BACHAWAT AND MR JUSTICE P SATYANARAYANA RAJU

Thakur Ram and others

*Appellants**

The State of Bihar

Respondent

Criminal Procedure Code (V of 1898) section 437—Power to order commitment under—When attracted—Express order of discharge by a Magistrate in respect of an offence exclusively triable by Court of Sessions if necessary—Exercise of power under the section is discretionary—Should be exercised judicially

The argument that the powers conferred by section 437 of the Criminal Procedure Code are exercisable only in a case where a Magistrate by an express order discharges an accused person in respect of an offence exclusively triable by a Court of Sessions and that the failure or refusal by the Magistrate to commit an accused person for trial by a Court of Sessions does not amount to an implied discharge of the accused person so as to attract the powers under section 437 is not tenable. When a case is brought before a Magistrate in respect of an offence exclusively or appropriately triable by a Court of Sessions what the Magistrate has to be satisfied about is whether the material placed before him makes out an offence which can be tried only by the Court of Sessions or can be appropriately tried by that Court or whether it does not make out any offence at all. An express order of discharge is contemplated only in a case where a Magistrate comes to the conclusion that the act alleged against the accused does not amount to an offence at all and therefore no question of trying him either himself or by any other Court arises. But if instead of committing the accused to a Court of Sessions the Magistrate proceeds to try the accused himself upon the view that on the evidence found acceptable by him only a minor offence is made out for which no commitment is required the revisional power under section 437 can be exercised before the conclusion of the trial before such Magistrate, though no express order of discharge in respect of an offence exclusively triable by the Court of Sessions is made by the Magistrate.

Nahar Singh v State, 1 L R. (1952) 2 All 152 (F B) Sri Dalip Singh and others v State, AIR 1944 All 163 and Sambhu Charan Mandal v The State 60 CWN 708, overruled in re Nalla Baligadu (1953) 2 M L J 1 AIR 1953 Mad 801 (F B) Approved

The provisions of section 437 of the Criminal Procedure Code, however, do not make it obligatory upon a Sessions Judge or a District Magistrate to order commitment in every case where an offence is exclusively triable by a Court of Sessions. The law gives a discretion to the revising authority and that discretion has to be exercised judicially. One of the factors which has to be considered is whether the intervention of the revising authority was sought by the prosecution at an early stage.

In the instant case an attempt to have the case committed to the Court of Sessions failed right in the beginning and was repeated not earlier than 15 months from that date. The second attempt also failed. Instead of filing an application for revision against the order of the Magistrate refusing to pass an order of commitment the prosecution chose to make a second application upon the same facts. It may be that successive applications for such a purpose are not barred but where a later application is based on the same facts as the earlier one, the Magistrate would be justified in refusing it. Where the Magistrate has acted in this way the revisional Court ought not with propriety interfere unless there are strong grounds to justify interference. Further, in the instant case after the attempts of the prosecution to get a commitment failed, it was a private party and not the prosecution which sought the exercise of the revisional power under section 437 of the Criminal Procedure Code. The criminal law is not to be used as an instrument of wreaking private vengeance by an aggrieved party. Under the circumstances, it was injudicious on the part of the Sessions Judge to have ordered commitment.

under section 437 of the Criminal Procedure Code, of the accused in the present case to the Sessions Court for trial.

Appeals by Special Leave from the Judgment and Order dated the 25th August, 1962, of the Patna High Court in Criminal Revisions Nos. 527 to 530 of 1962.

Nuruddin Ahmad and *U. P. Singh*, Advocates, for Appellants (In all the Appeals).

S. P. Varma and *R. N. Sachthey*, Advocates, for Respondent (In all the Appeals).

The Judgment of the Court was delivered by

Mudholkar, J.—This judgment will also govern CrI. As. Nos. 166 of 1962, 167 of 1962 and 168 of 1962. A common question arises in these appeals from a judgment of the Patna High Court dismissing four revision applications preferred before it by four sets of appellants in the appeals before us. Counsel on both the sides agree that since the relevant facts of all the proceedings are similar and the question of law arising from them is the same it will be sufficient to refer to the facts of Case No. TR 320 of 1960.

Four informations were lodged at the Police Station Ghora Saha on 14th April, 1960, by different persons against the different appellants in these cases and a similar information was lodged against some of the appellants by one Mali Ram. In all these cases the allegations made by the informants were that each set of the accused persons armed with deadly weapons went to the shops of the various informants, demanded from them large sums of money and threatened them with death if they failed to pay the amounts demanded by them. The informations also stated that some of these persons paid part of the money and were given time to pay the balance while some agreed to pay the amounts demanded. Upon informations given by these persons offences under section 392, Indian Penal Code, were registered by the Station Officer and after investigation five challans were lodged by him in the Court of Magistrate, First Class at Motihari. One of the cases ended in an acquittal but we have not been informed of the date of the judgment in that case. In the other four cases trial had come to a close in that all the prosecution witnesses and the defence witnesses had been examined and the cases had been closed for judgment.

In the case against the appellants in CrI. A. No. 165 of 1962 the challan was presented on 27th October, 1960. The order sheet of that date reads as follows :

S. No.	Date of order or proceeding.	Order with the signature of the Court.	Office action taken with date.
1.	27-10-1960	All the 4 accused are present. Heard both sides. It is argued on behalf of the prosecution that it is fit case for adopting procedure under Chapter XVIII, Criminal Procedure Code, and also that the entire occurrence relates to offences committed on 4 dates so that all of them cannot be dealt with as a single case. Discussed law point.	
		Charge under section 302, Indian Penal Code, framed against accused Thakur Ram and Jagarnath Pd. and explained to them. They plead not guilty. This case will constitute an independent case. As for the other parts of the alleged occurrence accused Jagarnath, Kamal Ram and Bansi Ram are charged separately under section 384, Indian Penal Code, and further accused Thakur Ram under section 384/109, Indian Penal Code, and explained to the respective accused. They plead not guilty. These charges relating to three incidents on 3 dates will constitute a separate single case.	
		Start separate order sheet for both. Summons P.W. for 26th October, 1960, and 27th November, 1960.	
		Accused as before.	

(Sd.) O. NATH."

The trial dragged on for nearly 15 months and then the prosecution made an application to the Court for framing a charge under section 386 or section 387, Indian Penal Code, and for committing the case to a Court of Sessions. This was

disposed of by the learned Magistrate on 25th January, 1962. The relevant portion of his order sheet of that date reads thus

"Accused absent. A petition for their representation under section 540-A, Criminal Procedure Code, is filed. Allowed. No reference book is produced. Perused the record. The prosecution has pressed to refer the case to the Court of Sessions under section 386 or 387 Indian Penal Code. On close scrutiny I find that the robbery defined inside 390, Indian Penal Code, fully covers the ingredients pointed out and asked by the prosecution side. The case has entered in the defence stage. This point was not introduced ever before. The charge was framed under section 392 Indian Penal Code, after hearing the parties. Although it may be referred to the superior Court at any stage, I find no reason to do so.

Put up on 28th February, 1962. All accused to appear with D. Ws. without fail.
Accused as before."

On 28th February, 1962, the prosecution moved a petition for stay of proceedings on the ground that it wanted to prefer an application for revision of the order of 25th January, 1962. Stay was refused and the case was proceeded with. On 17th March, 1962, the defence case was closed and the case was fixed for 29th March, 1962, for arguments. On that date a second application was made for committing the case to the Court of Sessions. It would appear from the order sheet of 29th March, 1962, that the Magistrate heard the parties and ordered the case to be put up on the next day, that is 30th March, 1962. On this day the Magistrate passed an order to the following effect:

"30th March, 1962. All the 2 accused persons are present. Having carefully gone through the law points and section 235 Criminal Procedure Code, I do not find that it is a case exclusively coming under section 386 or 387 Indian Penal Code. Hence the prosecution prayer is rejected."

Immediately thereafter a revision application was preferred, not by the prosecution, but by Sagarmal, an informant in one of the other three cases. The Sessions Judge, Champaran, after briefly reciting the facts and reasons on which the order of the trying Magistrate was founded, disposed of the revision application in the following words:

"The cases are of very serious nature and the framing of charges under section 386 or 387 Indian Penal Code cannot be ruled out altogether. Consequently I direct that each of these cases should be tried by a Court of Session. The learned Magistrate will commit the accused persons for trial accordingly. The applications are thus allowed."

An application for revision was preferred by the appellants before the High Court and the main ground urged on their behalf was that the Sessions Judge had no jurisdiction to pass an order for commitment as there was no order of discharge by the Magistrate. There is conflict of authority on the question whether under section 437, Criminal Procedure Code, a Sessions Judge can in the absence of an express order of discharge, direct commitment of a case to a trial where the trial is proceeding before a Magistrate in respect of offences not exclusively triable by a Court of Sessions. After referring to some decisions and relying upon two decisions of the Allahabad High Court the learned Judge who disposed of the revision application observed as follows:

"As I have already indicated in the instant cases, the trial Magistrate, after hearing the parties, refused to frame a charge for the major offence under section 386 or section 387 of the Indian Penal Code. The refusal by the Magistrate to frame a charge under section 386 or 387 of the Indian Penal Code was a final order and it amounted to an order of discharge of the accused of the offence under those sections. That being the position the learned Sessions Judge had full jurisdiction to order for commitment."

The learned Judge further observed:

"Without expressing any opinion on the merits of the four cases, I would state that, on the materials on record, the Sessions Judge was not unjustified in passing the impugned order for commitment of the accused in the four cases. The order of the Magistrate refusing to frame a charge under section 386 or section 387 of the Indian Penal Code, which amounted to an order of the implied discharge of the accused, was improper in all the four cases."

and dismissed the revision applications.

An application was made for a certificate of fitness to appeal to this Court. That was rejected and the appellants have come here by Special Leave.

The ambit of the powers of the Sessions Judge under section 437, Criminal Procedure Code, has been considered by a Full Bench of the Allahabad High Court in *Nahar Singh v. State*¹. In that case it was held that the powers conferred by that section are exercisable only in a case where a Magistrate by an express order discharges an accused person in respect of an offence exclusively triable by a Court of Sessions. The learned Judges constituting the Full Bench have taken the view that in the light of certain provisions of the Code to which they adverted, the failure of or refusal by a Magistrate to commit an accused person for trial by a Court of Sessions does not amount to an implied discharge of the accused person so as to attract the power of the Sessions Judge under section 437, Criminal Procedure Code, to direct the Magistrate to commit the accused person for trial by a Court of Sessions on the ground that the offence is exclusively triable by a Court of Sessions. The Full Bench decision has been followed in *Sri Dulap Singh and others v. State through Sri Harmandan Singh*². Before us reliance is also placed on behalf of the appellants on the decision in *Yunus Shaikh v. The State*³. That decision, however, is of little assistance to them because the ground on which the High Court set aside the order of the Sessions Judge is not that he had no jurisdiction to make it under section 437, Criminal Procedure Code, but that the action of the Magistrate in not framing a charge under section 366 of the Indian Penal Code but framing a charge only under section 498, Indian Penal Code, did not, in the light of the material before him, amount to an improper discharge of the accused in respect of an offence triable by a Court of Sessions. The view taken by the Allahabad High Court has been accepted as correct in *Sambhu Charan Mandal v. The State*⁴. On the other hand a Full Bench of the Madras High Court has held in *re Nalla Baligadu*⁵, that where under section 209 (1) a Magistrate finds that there are not sufficient grounds for committing the accused for trial and directs such person to be tried before himself or some other Magistrate the revisional powers under section 437, Criminal Procedure Code, can be exercised before the conclusion of the trial before such Magistrate. The learned Judges expressly dissented from the view taken by the Full Bench of the Allahabad High Court. This decision has been followed in *Rambalam Pd. Singh v. State of Bihar*⁶. Other decisions which take the same view as the Madras High Court are : *Krishnareddi v. Subbamma*⁷; *Shambhooram v. Emperor*⁸; *Sultan Ali v. Emperor*⁹; and in *re Valluru Narayana Reddy and others*¹⁰.

In order to decide the question which has been raised before us it would be desirable to bear in mind the relevant provisions of the Code of Criminal Procedure. Section 207 provides that in every inquiry before a Magistrate where the case is triable exclusively by a Court of Sessions or High Court, or, which in the opinion of the Magistrate, ought to be tried by such Court, the Magistrate must in any proceeding instituted on a Police Report, follow the procedure specified in section 207-A. Under section 207-A the Magistrate, after perusing the Police Report forwarded under section 173, has to fix a date for hearing and require the production of the accused on that date. He has also the power to compel the attendance of such witnesses or the production of any document or thing on that date if an application is made in that behalf by the officer conducting the prosecution. On the date of hearing the Magistrate, after satisfying himself that copies of the documents referred to in section 173 have been furnished, has to proceed to take the evidence of such persons, if any, as are produced as witnesses to the actual commission of the offence. After the examination of those witnesses and after their cross-examination by the accused the Magistrate may, if he thinks it necessary so to do in the interest of justice, take the evidence of any one or more of the other witnesses for the prosecution. He has then to examine the accused for the purpose of enabling him to explain the circumstances appearing in the evidence against him and hear both the prosecution as well as the accused. If at that stage he is of opinion that no

1. I.L.R. (1952) 2 All. 152 (F.B).
 2. A.I.R. 1944 All. 163.
 3. A.I.R. 1953 Cal. 567.
 4. (1955-56) 60 C.W.N. 708.
 5. (1953) 2 M.L.J. 1 : A.I.R. 1953 Mad. 801 (F.B.).

6. A.I.R. 1960 Patna 507.
 7. (1900) I.L.R. 24 Mad. 136 (F.B.).
 8. A.I.R. 1935 Sind 221.
 9. A.I.R. 1934 Lahore 164.
 10. (1954) 2 M.L.J. (Andh) 147 : A.I.R. 1955 Andhra 48.

ground for committing the accused for trial exists the Magistrate can after recording his reasons discharge the accused. If however it appears to the Magistrate that such person should be tried by himself or some other Magistrate he must proceed accordingly. This contingency will arise if the Magistrate forms an opinion that no case exclusively triable by a Court of Sessions is disclosed but a serious offence which it is within the competence of the Magistrate to try is disclosed. In that case he has to proceed to try the accused himself or send him for trial before another Magistrate. Where the Magistrate is of opinion that the accused should be committed for trial he has to frame a charge and declare with what offence the accused should be charged. With the remaining provisions of section 207 A we are not concerned. It will thus be seen that where the Police Report suggests the commission of an offence which is exclusively triable by a Court of Sessions the Magistrate can nevertheless proceed to try the accused for an offence which is triable by him if he is of the view that no offence exclusively triable by a Court of Sessions is disclosed. Similarly even in a case where an offence is triable both by a Magistrate and a Court of Sessions the Magistrate is of the view that the circumstances do not warrant a trial by a Court of Sessions he can proceed with the trial of the accused for that offence himself. Sect on 347 which occurs in Chapter XXIV headed General provisions as to Inquiries and Trials empowers a Magistrate to commit a person for trial by a Court of Sessions if in the course of the trial before him and before signing the judgment it appears to him at any stage of the proceeding that the case ought to be so tried. These provisions would thus indicate that an express order of discharge is contemplated only in a case where a Magistrate comes to the conclusion that the act alleged against the accused does not amount to any offence at all and therefore no question of trying him either himself or by any other Court arises. They also show that where an accused person is being tried before a Magistrate in respect of an offence triable by that Magistrate it appears to the Magistrate that the act of the accused amounts to an offence which is triable either exclusively or concurrently by a Court of Sessions he has the power to order his committal. This power however has to be exercised only before signing the judgment. It cannot obviously be exercised thereafter because of the provisions of section 403 (1) which bar the trial of the person again not only for the same offence but also for any other offence based on the same facts. It would follow from this that where on a certain state of facts the accused is alleged by the prosecution to have committed an offence exclusively triable by a Court of Sessions but the Magistrate is of the opinion that the offence disclosed is only an offence which he is himself competent to try and either acquits or convicts him there is an end of the matter in so far as the very set of facts are concerned. The facts may disclose really a very grave offence such as say one under section 302 Indian Penal Code but the Magistrate thinks that the offence falls under section 304 A which he can try and after trying the accused either convicts or acquits him. In either case the result would be that the appropriate Court will be prevented from trying the accused for the grave offence which those very facts disclose. It is to obviate such a consequence and to prevent inferior Courts from clutching at jurisdiction that the provisions of section 437 Criminal Procedure Code have been enacted. To say that they can be availed of only where an express order of discharge is made by a Magistrate despite the wide language used in section 437 would have the result of rendering those provisions inapplicable to the very class of cases for which they were intended. When a case is brought before a Magistrate in respect of an offence exclusively or appropriately triable by a Court of Sessions what the Magistrate has to be satisfied about is whether the material placed before him makes out an offence which can be tried only by the Court of Sessions or can be appropriately tried by that Court or whether it makes out an offence which he can try or whether it does not make out any offence at all. In *Ramgopal Ganpatrao v State of Bombay*¹ this Court has pointed out

In each case therefore the Magistrate holding the preliminary enquiry has to be satisfied that a *prima facie* case is made out against the accused by the evidence of witnesses entitled to a reasonable degree of credit and unless he is so satisfied he is not to commit

It has, however, also to be borne in mind that the ultimate duty of weighing the evidence is cast on the Court which has the jurisdiction to try an accused person. Thus, where two views are possible about the evidence in a case before the Magistrate it would not be for him to evaluate the evidence and strike a balance before deciding whether or not to commit the case to a Court of Sessions. If, instead of committing the case to a Court of Sessions, he proceeds to try the accused upon the view that on the evidence found acceptable by him only a minor offence is made out for which no commitment is required he would obviously be making an encroachment on the jurisdiction of the appropriate Court. This may lead to miscarriage of justice and the only way to prevent it would be by a superior Court stepping in and exercising its revisional jurisdiction under section 437, Criminal Procedure Code.

There is nothing in the language of section 437 from which it could be said that this power is not exercisable during the pendency of a trial before a Magistrate or that this power can be exercised only where the Magistrate has made an express order of discharge. Express orders of discharge are not required to be passed by the Court in cases where, upon the same facts, it is possible to say that though no offence exclusively or appropriately triable by a Court of Sessions is made out, an offence triable by a Magistrate is nevertheless made out. One of the reasons given by the Allahabad High Court in support of the view taken by it is that a Magistrate has power even during the course of the trial to commit the accused to a Court of Sessions and that to imply a discharge from his omission to commit or refusal to commit would not be consistent with the existence of the Magistrate's power to order commitment at any time. That does not, however, seem to be a good enough ground for coming to this conclusion. The power to commit at any stage is exercisable by virtue of the express provisions of section 347 or section 236 and a previous discharge of an accused from a case triable by a Court of Sessions would not render the power unexercisable thereafter. Moreover, even if an express order of discharge is made by a Magistrate in respect of an offence exclusively triable by a Court of Sessions but a trial on the same facts for a minor offence is proceeded with the Magistrate has undoubtedly power to order his commitment in respect of the very offence regarding which he has passed an order of discharge provided of course the material before him justifies such a course. There is nothing in section 347, which precludes him from doing this. It will, therefore, be not right to say that the power conferred by section 437 is exercisable only in respect of express orders of discharge. In this context it will be relevant to quote the following passage from the judgment of the Full Bench of the Madras High Court in *Krishna Reddy's case*¹ :

"I do not think that the order of the Sessions Judge was one which he had no jurisdiction to make. In my view the decision of the Magistrate must be taken to be not only one of acquittal of an offence punishable under section 379, Indian Penal Code, but one of discharge so far as the alleged offence under section 477, Indian Penal Code, is concerned. The complaint against the accused was that he committed an offence punishable under section 477, Indian Penal Code. Such offence is triable exclusively by the Court of Session. The Magistrate could neither acquit nor convict him of such offence. He was bound either to commit him to the Sessions Court or to discharge him. He did not commit him. The only alternative was to discharge him, and that, I take it, is what the Magistrate really did do. It is not suggested that the charge under section 477 is still pending before the Magistrate. It has been disposed of, and the only question is as to what the disposal has been. It seems to me that the accused has been discharged so far as the charge under section 477 is concerned. The Magistrate's order, if stated fully, should have been 'I discharge him as regards the offence punishable under section 477, and I acquit him as regards the offence punishable under section 379'."

We agree and are, therefore, of the view that the High Court was right, in holding that the Sessions Judge had jurisdiction to make an order directing the Magistrate to commit the case for trial by a Court of Sessions.

The provisions of section 437, however, do not make it obligatory upon a Sessions Judge or a District Magistrate to order commitment in every case where an offence is exclusively triable by a Court of Sessions. The law gives a discretion to the revising authority and that discretion has to be exercised judicially. One of the factors which has to be considered in this case is whether the intervention of the

revising authority was sought by the prosecution at an early stage. It would be seen that an attempt to have the case committed failed right in the beginning and was repeated not earlier than 15 months from that date. The second attempt also failed. Instead of filing an application for revision against the order of the Magistrate refusing to pass an order of commitment the prosecution chose to make a second application upon the same facts. It may be that successive applications for such a purpose are not barred but where a later application is based on the same facts as the earlier one the Magistrate would be justified in refusing it. Where the Magistrate has acted in this way the revisional Court ought not to with propriety interfere unless there are strong grounds to justify interference. While rejecting the application on 25th January, 1962 the ground given by the learned Judge was that the case had already entered the defence stage and the attempt to have the committal was very belated. Matters had advanced still further when a third attempt failed on 30th March, 1962. By that date not only had the defence been closed and arguments heard but the case was actually closed for judgment. It would be a terrible harassment to the appellants now to be called upon to face a fresh trial right from the beginning which would certainly be the result if the Magistrate were to commit the appellants for trial by a Court of Sessions now. It is further noteworthy that after the last attempt failed it was not the prosecution which went up in revision before the Sessions Judge but the informants and as pointed out earlier, in the matter concerning the appellants before us it was not even the informant Shyam Lal but one Sagarnal the informant in another case who preferred a revision application. In a case which has proceeded on a police report a private party has really no *locus standi*. No doubt the terms of section 435 under which the jurisdiction of the learned Sessions Judge was invoked are very wide and he could even have taken up the matter *suo motu*. It would however not be irrelevant to bear in mind the fact that the Court's jurisdiction was invoked by a private party. The criminal law is not to be used as an instrument of wreaking private vengeance by an aggrieved party against the person who according to that party, had caused injury to it. Barring a few exceptions in criminal matters the party who is treated as the aggrieved party is the State which is the custodian of the social interests of the community at large and so it is for the State to take all the steps necessary for bringing the person who has acted against the social interests of the community to book. In our opinion it was injudicious for the learned Sessions Judge to order the commitment of the appellants particularly so without giving any thought to the aspects of the matter to which we have adverted. Even the High Court has come to no positive conclusion about the propriety of the direction made by the Sessions Judge and has merely said that the Sessions Judge was not unjustified in making the order which he made in each of the applications. For all these reasons we allow the appeals, quash the orders of the Sessions Judge as affirmed by the High Court and direct that the trials of each of the appellant shall proceed before the Magistrate according to law from the stages at which they were on the date on which the stay order became operative.

V K

Appeals allowed

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—P. B. GAJENDRAGADKAR, *Chief Justice*, K. N. WANCHOO, M. HIDAYATULLAH AND V. RAMASWAMI, JJ.

Workmen of the Motipur Sugar Factory Private Ltd.

.. Appellants*

v.

Motipur Sugar Factory Private Ltd.

.. Respondent.

Industrial Disputes Act (XIV of 1947), section 10—Reference under requiring decision on the question 'whether the discharge of workmen concerned was justified'—Scope of reference.

Industrial dispute—Dispute arising out of discharge of workmen—Reference to industrial Tribunal—Absence of domestic enquiry before dismissal as required by Standing Orders—Effect—Employer if can justify discharge before the Tribunal—Jurisdiction of Tribunal.

Constitution of India (1950), Article 136—Findings of fact recorded by a Tribunal—Interference with by Supreme Court—Practice.

Factories Act (LXIII of 1948), sections 55 and 64 (2) (d)—Section 64 (2) (d) if over-rides section 55.

The management of a sugar factory issued two notices to its workers in cane carrier department on 15th December, 1960 and 17th December, 1960 respectively. The first notice stated, *inter alia*, that the workers concerned have deliberately and wilfully resorted to a clear go-slow in combination with each other and that unless they voluntarily recorded their willingness to discharge their duties faithfully and diligently by 4 P.M. on 17th December, 1960 they would be considered no longer in their employment. The second notice issued at 5 P.M. on 17th December, 1960, stated that the workers who failed to record their willingness as required by the earlier notice stand discharged and that their names have been struck off from the rolls with effect from 18th December, 1960. Subsequently on a joint application made by both the parties to the Government, the question "whether the discharge of the workmen concerned was justified" was referred to the Industrial Tribunal for adjudication. The Tribunal after considering the evidence adduced came to the conclusion that there was go-slow during the relevant period and that the discharge of the workmen was therefore justified.

In the present appeal to the Supreme Court against the order of the Tribunal it was contended that the Tribunal misdirected itself as to the scope of the reference and that all that the Tribunal was concerned with was to decide whether the discharge of the workmen for not giving an undertaking as required by the notice dated 15th December, 1960, was justified and that it was no part of the duty of the Tribunal to decide whether there was go-slow which would justify the order of discharge.

Held, in going into the question whether there was go-slow which would justify the order of discharge the Tribunal did not misdirect itself as to the scope of the reference.

The reference was wide and general in terms and asked the Tribunal to decide whether the discharge of the workmen concerned was justified or not. It did not mention the grounds on which the discharge was based and it was for the Tribunal to investigate the grounds and decide whether those grounds justified discharge or not.

The two notices of 15th December, and 17th December have to be read together and so read there can be no doubt that though the discharge was worded as if it was due to the failure on the part of the workmen to record their willingness to work faithfully and diligently, it was really due to the workmen concerned using go-slow tactics. Taking into account the wide terms of the reference, the manner in which it was understood before the Tribunal where both the parties led voluminous evidence on the question of go-slow and the fact that it must be read along with the two notices, there can be no doubt that the Tribunal was entitled to go into the real dispute between the parties, namely, whether the discharge was justified on the ground that there was misconduct in the form of go-slow.

It is now well settled by a number of decisions of the Supreme Court that where an employer has failed to make an enquiry before dismissing or discharging a workman, it is open to him to justify the action before the Industrial Tribunal, to whom the dispute arising out of such discharge is referred for adjudication, by leading all relevant evidence before it. In such a case the employer would not have the benefit which he had in cases where domestic enquiries have been held. The entire matter would be open before the Tribunal which will have jurisdiction not only to go into the limited questions open to a Tribunal where domestic enquiry has been properly held but also to satisfy itself on the facts

adduced before it by the employer whether the dismissal or discharge was justified. The important effect of omission to hold an enquiry would be merely this: the Tribunal would not have to consider only whether there was a *prima facie* case but would decide for itself on the evidence adduced whether the charges have really been made out. If the enquiry is defective or if no enquiry has been held as required by the Standing Orders, the entire case would be open before the Tribunal and the employer would have to justify on facts as well that its order of dismissal was proper. A defective enquiry stands on the same footing as no enquiry and in either case the Tribunal would have jurisdiction to go into the facts and the employer would have to satisfy the Tribunal that on facts the order of discharge or dismissal was proper.

If it is held that in cases where the employer dismisses his employee without an enquiry, the dismissal must be set aside by the Industrial Tribunal only on that ground, it would inevitably mean that the employer will immediately proceed to hold the enquiry and pass an order dismissing the employee once again. In that case another industrial dispute would arise and the employer would be entitled to rely upon the enquiry which he had held in the meantime. This course would mean delay. On the other hand, if in such cases the employer is given an opportunity to justify the impugned dismissal on the merits, the employee has the advantage of having the merits of his case being considered by the Tribunal for itself and that clearly would be to the benefit of the employee.

Ordinarily the Supreme Court does not go into findings of fact recorded by a Tribunal unless there are some special reasons, as for example, where the finding is based on no evidence at all.

(In the instant case, however, as it involved the discharge of as many as 119 workmen who were discharged on the ground of misconduct in the form of go-slow, the Court went broadly into the evidence to see whether the finding of fact recorded by the Industrial Tribunal that the workmen concerned were guilty of go-slow was patently wrong.)

Section 64 (2) (d) of the Factories Act (LXIII of 1948) being a special provision will override section 55 (1) and (2) of the same Act for it gives power to the State Government by making Rules to exempt certain types of factories from the application of section 55 subject to such conditions and to such extent as the Rules may provide.

By relevant Rules framed by the Government of Bihar under section 64 (2) (d) of the Factories Act, sugar factories in Bihar have been exempted from the application of section 55 for purposes of handling and crushing of cane among others, subject to the condition that the workers concerned shall be allowed to take light refreshment or meal once during any period exceeding four hours. Thus cane crushing operations in sugar factories in Bihar are exempt from sect. 55 of the Factories Act subject to the condition mentioned above.

Appeal by Special Leave from the Award dated 11th May, 1962, of the Industrial Tribunal, Bihar, Patna in Reference No. 4 of 1961.

Ramen Roy, Jai Krishan and G. S. Chatterjee, Advocates, and *Mrs E. Udayarathnam*, Advocate for *A. K. Nag*, Advocate, for Appellants.

Naren De, Additional Solicitor General of India, (*Naunit Lal*, Advocate, with him), for Respondent.

The Judgment of the Court was delivered by

Wanchoo, J.—This is an appeal by Special Leave against the award of the Industrial Tribunal, Bihar. It relates to the discharge of 119 workmen of the respondent who were employed as cane carrier mazdoors or as cane carrier supervisors or jamadars. All these were seasonal workmen. It is necessary to set out in some detail the circumstances leading to the discharge. The respondent is a sugar factory and the crushing season starts usually in the first half of November, each year. We are concerned in the present appeal with November, and December, 1960. It appears that from the season 1956-57, the respondent introduced an incentive bonus scheme in the factory. The scheme continued thereafter from season to season with certain changes. It also appears that in the beginning of each season, the respondent used to put forward the incentive bonus scheme and consult the workmen. The same thing was done when the season 1960-61 was about to start in November, 1960. But the scheme for this season proposed by the respondent contained certain changes which were apparently not acceptable to the workmen. One of the features in the scheme was that the crushing of sugar cane per day should

be 32,000 maunds. The general secretary of the union of the workmen suggested certain alterations for the consideration of the respondent on 7th November, 1960, and one of the main alterations suggested was that the norm for per day's crushing should be 25,000 maunds of cane and thereafter incentive bonus should be given at a certain rate. No agreement seems to have been reached on the incentive bonus scheme, and the complaint of the respondent was that the secretary incited the workmen to go-slow in consequence of the change in the scheme. Consequently mild go-slow in the cane carrier department which is the basic department in a sugar mill began from the very start of the season on 10th November, 1960. The respondent's case further was that on 27th November, 1960, the workmen in the cane carrier department started in combination with one another to go-slow deliberately and wilfully and in a planned manner and thus reduced the average daily crushing to 26,000 maunds cane which was much less than the average crushing in previous seasons. This conduct of the workmen was said to be highly prejudicial to the respondent and besides being technically unsafe, had brought into existence an acute shortage in the fuel position which might have resulted in the complete stoppage of the mill and a major breakdown of the machinery. When the position became serious the respondent issued a general notice on 15th December, 1960, inviting the attention of the workmen concerned to this state of affairs which had been continuing at any rate since 27th November, 1960. This notice was in the following terms :—

“At the instigation of Shri J. Krishna, the General Secretary of your Union, you, since the very beginning of this season, have been failing in your duty to ensure adequate and regular loading of the cane carrier, and with effect from the 27th November, 1960, you, in combination with each other, have deliberately and wilfully resorted to a clear ‘go-slow’ tactics, a fact openly admitted by the above-named General Secretary of your Union in presence of the Labour Superintendent and Labour Officer Muzaffarpur, in course of discussions held on the subject in the office of the Assistant Labour Commissioner on the 6th December, 1960. You have deliberately reduced the average daily crushing to more or less 26,000 maunds out of which more than 2,000 maunds is due to the newly introduced device of direct feeding of the cane carrier by cane carts weighed during nights and not attributable to any effort on your part. Thus the actual crushing given by you is practically some thing between 23,000 and 24,000 maunds only which is highly uneconomical and technically unsafe for this factory with an installed crushing capacity of more than 1,200 tons a day. About 14,000 bales of extra bagasse kept in stock as reserve have already been consumed in the past 12 days or so and now the factory is faced with a situation when at any moment its boilers may go out of steam for want of bagasse-fuel leading to an abrupt stoppage of the mills and finally resulting into a major breakdown of machineries.

It is therefore hereby notified that unless you voluntarily record your willingness individually to discharge your duties faithfully and diligently by feeding the cane carrier so as to give a minimum average daily crush of 32,000 maunds excluding stoppages other than those due to overloading or underloading of the cane carrier, you will be considered to be no longer employed by the company. You must record your willingness in the office of the Factory Manager on or before 4 P.M. of Saturday the 17th December, 1960, failing which you shall stand discharged from the service of the company without any further notice with effect from 18th December, 1960, and your place will be filled by recruiting other labour to man the cane carrier station.”

This notice was put on the notice-board along with translations in Hindi and Urdu and it was also sent individually to the workmen in the cane carrier department. A copy was also sent to the secretary of the union with a request to reconsider his stand and advise the workmen concerned to submit their willingness as desired by the respondent in the notice in question either individually or even collectively through the union. The secretary of the union replied to this notice on the same day and said that it was “full of maliciously false and mischievous statements.” The secretary also denied that the workmen had adopted go-slow tactics or that he had advised the workmen to adopt such tactics. Finally the secretary said that it was simply fantastic to ask a worker to give an undertaking to crush at least 32,000 maunds per day and if the service of any workman was terminated on his not giving the undertaking, the responsibility would be that of the respondent itself. The respondent's case was that three workmen gave undertakings as required in the notice while the rest did not. Thereafter the situation in the factory deteriorated and the workmen grew more and more unruly and even started entering the factory without taking their attendance token. In consequence of this attitude of the workmen, the respondent issued a notice at 5 P.M. on 17th December, 1960, which was in the following terms :—

"The following workers of the cane carrier station who failed to record their willingness in factory manager's office by 4 P.M. this day the 17th December, 1960, to work faithfully and diligently in accordance with the management's notice dated 15th December, 1960, stand discharged from the company's service and their names have been struck off the rolls with effect from 18th December, 1960. From now on, the workers concerned have forfeited their right to go to and occupy their former place of work and any action contrary to this on their part will make them liable to prosecution for criminal trespass."

Their final account will be ready for payment by 4 P.M. on the 19th December, 1960, when, or whereafter, they may present themselves at the company's Time Office for receiving payment of their wages and other dues, if any, during working hours."

and then mentions the names of 119 workmen of the cane carrier department. Thus the services of the workmen concerned stood discharged from 18th December, 1960, under this notice. This was followed by a general strike in pursuance of the notice served on the respondent by the union on 17th December, 1960. The strike continued up to 22nd December, 1960, when as a result of an agreement it was decided that the case of the discharged workmen and the question of wages for the strike period be referred to adjudication. Consequently a joint application by both parties was made to Government on 21st December, 1960. The Government then made a reference of the following two questions to the tribunal on 25th January, 1961:

1. Whether the discharge of workmen mentioned in the Appendix was justified. If not, whether they should be reinstated and/or they are entitled to any other relief?

3. Whether the workmen be paid wages for the period 16-00 hrs on 18th December, 1960, & 8-00 hours on 22nd December, 1960?

It may be mentioned that the respondent had held no enquiry as required by the Standing Orders before dispensing with the services of the workmen concerned. Therefore, when the matter went before the tribunal, the question that was tried was whether there was go-slow between 27th November, 1960, and 15th December, 1960. The respondent led evidence, which was mainly documentary and based on the past performance of the factory to show that there was in fact go-slow by the workmen concerned during this period. The appellants on the other hand also relying on the record of the respondent tried to prove that the cane carrier department had been giving normal work in accordance with what had happened in the past in connection with cane crushing. That is how the tribunal considered the question on the basis of the relevant statistics supplied by both parties and also evidence whether there was go-slow during this period or not. After considering all the evidence it came to the conclusion that there was go-slow during this period. Consequently it held that the discharge of the workmen was fully justified. It therefore answered the first question referred to it in favour of the respondent. The second question with respect to wages for the strike period was not pressed on behalf of the appellants and was therefore decided against them. Thereafter the appellants came to this Court and obtained Special Leave; and that is how the matter has come up before us.

We are concerned in the present appeal only with the first question which was referred to the tribunal. Learned Counsel for the appellants has raised three main contentions before us in support of the appeal. In the first place it is contended that the tribunal misdirected itself as to the scope of the reference and that all that the tribunal was concerned with was to decide whether the discharge of the workmen for not giving an undertaking was justified or not, and that it was no part of the duty of the tribunal to decide whether there was go-slow between the relevant dates which would justify the order of discharge. Secondly, it is urged that the respondent had given no charge-sheets to the workmen concerned and had held no enquiry as required by the Standing Orders. Therefore, it was not open to the respondent to justify the discharge before the tribunal, and the tribunal had no jurisdiction to go into the merits of the question relating to go-slow. Lastly it is urged that the finding of the tribunal that go-slow had been proved was perverse and the tribunal had ignored relevant evidence in coming to that conclusion. We shall deal with these contentions seriatim.

Re : (i).

We have already set out the relevant term of reference and it will be seen that it is wide and general in terms and asks the tribunal to decide whether the discharge of the workmen concerned was justified or not. It does not mention the grounds on which the discharge was based and it is for the tribunal to investigate the grounds and decide whether those grounds justify discharge or not. So if the tribunal finds that the discharge was due to the use of go-slow tactics by the workmen concerned it will be entitled to investigate the question whether the use of go-slow tactics by the workmen had been proved or not.

But the argument on behalf of the appellants is that the notice of 17th December gives the reason for the discharge and the tribunal is confined only to that notice and has to consider whether the reason given in that notice for discharge is justified. We have already set out that notice and it certainly says that the workmen mentioned at the foot of the notice had failed to record their willingness to work faithfully and diligently in accordance with the respondent's notice of 15th December, 1960, and therefore they stood discharged from the respondent's service and their names had been struck off the rolls from 18th December, 1960. So it is argued that the reason for the discharge of the workmen concerned was not go-slow but their failure to record their willingness to work faithfully and diligently. The tribunal had therefore to see whether this reason for the discharge of the workmen was justifiable, and that it had no jurisdiction to go beyond this and to investigate the question of go-slow.

We are of opinion that there is no force in this argument. Apart from the question that both parties before the tribunal went into the question of go-slow and voluminous evidence was led from both sides either to prove that there was go-slow or to disprove the same, it appears to us that it would be taking much too technical a view to hold that the discharge was due merely to the failure of the workmen to give the undertaking and that the go-slow had nothing to do with the discharge. We are of opinion that the two notices of 15th December, and 17th December, have to be read together and it may be pointed out that the notice of 17th December does refer to the earlier notice of 15th December. If we read the two notices together, there can be in our opinion no doubt that though the discharge is worded as if it was due to the failure to record their willingness to work faithfully and diligently, it was really due to the workmen concerned using go-slow tactics. Notice of 15th December, is in two parts. The first part sets out the facts and states what the workmen had been doing from the very beginning of the season and particularly from 27th November, 1960. It states that on the instigation of the secretary of the union, the workmen had been failing in their duty to ensure adequate and regular loading of the cane carrier from the very beginning of the season. It further charges that with effect from 27th November, they had in combination with one another deliberately and wilfully resorted to a clear go-slow, a fact said to have been openly admitted by the secretary in the presence of the Labour Superintendent and Labour Officer, Muzaffarpur, in course of discussions held in the office of the Assistant Labour Commissioner on 6th December, 1960. The notice then says that the average daily crushing is 26,000 maunds out of which more than 2000 was due to the newly introduced device of direct feeding of the cane carrier by cane carts weighed during nights and not attributable to any effort on the workmen's part; thus the actual crushing had been practically reduced to something between 23,000 to 24,000 maunds per day, which was highly uneconomical and technically unsafe for the factory which had an installed crushing capacity of more than 1,200 tons a day i.e., over 32,000 maunds a day. The notice also says that about 14,000 bales of extra bagasse kept in stock as reserve had already been consumed in the last twelve days and the factory was faced with a situation when at any moment its boilers might go out of steam for want of bagasse-fuel leading to an abrupt stoppage of the mill and finally resulting in a major breakdown of machinery.

These facts which were given in the first part of the notice dated 15th December, 1960 really show the charge which the respondent was making against the workmen concerned. Having made this charge of go slow in the manner indicated in the first part of the notice (and it may be mentioned that this notice was not only put on the notice-board but was given to each workman individually), the respondent then indicated in the second part what action it intended to take. In this part the respondent told the workmen concerned that unless they voluntarily recorded their willingness individually to discharge their duties faithfully and diligently by feeding the cane carrier so as to give minimum average daily crush of 32,000 maunds excluding stoppages other than those due to over loading or under loading of the cane carrier, they would be considered to be no longer employed by the respondent. They were given time upto 4 P.M. on 17th December, 1960 to record their willingness failing which they would stand discharged from the respondent's service without any further notice with effect from 18th December, 1960. The second part of the notice thus indicated to the workmen concerned how much they had to crush every day to avoid the charge of go slow. It further indicated that the respondent was prepared to let bygones be bygones if the workmen concerned were prepared to give an undertaking in the manner desired. Assuming that the course adopted by the respondent was unjustified and even improper, a reading of the two parts of the notice of 15th December, 1960, shows what in the opinion of the respondent was the normal cane crushing per day and what was the charge of the respondent against the workmen concerned in the matter of go slow and what the respondent was prepared to accept if the workmen were agreeable to the claim of the respondent. It is clear therefore from the notice which was given on 15th December, 1960, that the respondent thought that 32,000 maunds should be the normal crush every day excluding stoppages other than those due to over loading or underloading of the cane carrier. It also charged the workmen with producing much less than this for the period from 27th November, 1960 to 15th December, 1960, though it was prepared to let bygones be bygones, provided the workmen in future undertook to give normal production. It is in the background of this charge contained in the notice of 15th December, 1960 that notice says that the workmen had failed to record their willingness to work faithfully and diligently in accordance with the notice of 15th December, 1960 and therefore they stood discharged, meaning thereby that the respondent was charging the workmen with go slow as indicated in the notice of 15th December, 1960 and thus as they were not prepared to give normal production even in future they were being discharged. Therefore, though in form the notice of 17th December, 1960 reads as if the workmen were being discharged for not giving the undertaking as desired, the real basis of the notice of discharge of 17th December, 1960 is the use of go slow which had already been indicated in the notice of 15th December, given to each workman individually also.

The reference was made on the joint application of both parties. If all that the workmen, desired in their joint application for reference was that it should only be considered whether the discharge of the workmen for refusing to give an undertaking was justified, there was nothing to prevent the workmen to insist that in the joint application this matter should be specifically mentioned. In the joint application the first matter which was specified was in these terms —

Whether the discharge of workmen mentioned in the appendix was justified? If not whether they should be reinstated and/or they are entitled to any other relief?

Now if all that was desired was that the tribunal should go into the question whether the discharge of the workmen on the ground that they had failed to give the undertaking should be investigated, it would have been easy to put this term only in the reference in the joint application thus — 'Whether the discharge of the workmen mentioned in the appendix on the ground of their failure to give an undertaking was justified?' The very fact that the matter specified as in dispute was put in the wide words already quoted above shows that the parties did not wish to confine their dispute only to the question whether the discharge on the ground of failure to give an undertaking was justified. Further we have already indicated that both

parties understood the dispute to be whether go-slow was justified or not and that is why voluminous evidence was led before the tribunal. The wide terms in which the reference was made along with the notice of 17th December, read with the notice of 15th December, leave no doubt in our mind that the reference included investigation of any cause which might have led to the discharge of the workmen. There is no doubt in this case that even though notice of discharge was phrased as if the discharge was being made on account of the failure to give an undertaking the real reason for the discharge was that the workmen had been guilty of go-slow between 27th November and 15th December, and were not prepared in spite of the respondent's giving them a chance to improve to show better results. Therefore taking into account the wide terms of reference, the manner in which it was understood before the tribunal and the fact that it must be read along with the two notices of 15th and 17th December, 1960, particularly because it was made soon thereafter at the joint application of the parties, we have no doubt that the tribunal was entitled to go into the real dispute between the parties, namely, whether the discharge was justified on the ground that there was misconduct in the form of go-slow by the workmen concerned between 27th November, 1960 to 15th December, 1960. The contention of the workmen therefore on this head must be rejected.

Re. (ii).

Then we come to the question whether it was open to the tribunal when there was no enquiry whatsoever by the respondent to hold an enquiry itself into the question of go-slow. It is urged on behalf of the appellants that not only there was no enquiry in the present case but there was no charge either. We do not agree that there was no charge by the respondent against the workmen concerned. The first part of the notice of 15th December, 1960 which was served on each individual workman was certainly a charge by the respondent telling the workmen concerned that they were guilty of go-slow for the period between 27th November and 15th December, 1960. It is true that the notice was not headed as a charge and it did not specify that an enquiry would follow, which is the usual procedure when a formal charge is given. Even so, there can be no doubt that the workmen concerned knew what was the charge against them which was really responsible for their discharge from 18th December, 1960.

It is now well-settled by a number of decisions of this Court that where an employer has failed to make an enquiry before dismissing or discharging a workman it is open to him to justify the action before the tribunal by leading all relevant evidence before it. In such a case the employer would not have the benefit which he had in cases where domestic enquiries have been held. The entire matter would be open before the tribunal which will have jurisdiction not only to go into the limited questions open to a tribunal where domestic enquiry has been properly held (see *Indian Iron & Steel Co. v. Their Workmen*¹, but also to satisfy itself on the facts adduced before it by the employer whether the dismissal or discharge was justified. We may in this connection refer to *Messrs. Sasa Musa Sugar Works (P.) Limited v. Shob-rati Khan*², *Phulbari Tea Estate v. Its Workmen*³, and *The Punjab National Bank Limited v. Its Workmen*⁴. These three cases were further considered by this Court in *Bharat Sugar Mills Limited v. Shri Jai Singh*⁵, and reference was also made to the decision of the Labour Appellate Tribunal in *Shri Ram Swarath Sinha v. Belsund Sugar Co.*⁶ It was pointed out that "the important effect of omission to hold an enquiry was merely this : that the tribunal would not have to consider only whether there was a *prima facie* case but would decide for itself on the evidence adduced whether the charges have really been made out". It is true that three of these cases, except *Phulbari Tea Estate's case*³, were on applications under section 23 of the Industrial Disputes Act, 1947. But in principle we see no difference whether the matter comes before the tribunal for approval under section 33 or on a reference under section 10

1. (1958) S.C.R. 667 : (1958) S.C.J. 285 :
(1958) M.L.J. (Cri.) 266.
2. (1959) Supp. 2 S.C.R. 836 : (1960)
S.C.J. 10 : (1959) M.L.J. (Cri.) 981.

3. (1960) 1 S.C.R. 32.
4. (1960) 1 S.C.R. 806 : 1960 S.C.J. 999.
5. (1962) 3 S.C.R. 684.
6. (1954) L.A.C. 697.

of the Industrial Disputes Act, 1947. In either case if the enquiry is defective or if no enquiry has been held as required by Standing Orders, the entire case would be open before the tribunal and the employer would have to justify on facts as well that its order of dismissal or discharge was proper. *Phulbari Tea Estates' case*¹, was on a reference under section 10, and the same principle was applied there also, the only difference being that in that case there was an inquiry though it was defective. A defective enquiry in our opinion stands on the same footing as no enquiry and in either case the tribunal would have jurisdiction to go into the facts and the employer would have to satisfy the tribunal that on facts the order of dismissal or discharge was proper.

If it is held that in cases where the employer dismisses his employee without holding an enquiry, the dismissal must be set aside by the industrial tribunal only on that ground, it would inevitably mean that the employer will immediately proceed to hold the enquiry and pass an order dismissing the employee once again. In that case, another industrial dispute would arise and the employer would be entitled to rely upon the enquiry which he had held in the meantime. This course would mean delay and on the second occasion it will entitle the employer to claim the benefit of the domestic enquiry. On the other hand, if in such cases the employer is given an opportunity to justify the impugned dismissal on the merits, the employee has the advantage of having the merits of his case being considered by the tribunal for itself and that clearly would be to the benefit of the employee. That is why this Court has consistently held that if the domestic enquiry is irregular, invalid or improper, the tribunal may give an opportunity to the employer to prove his case and in doing so, the tribunal tries the merits itself. This view is consistent with the approach which industrial adjudication generally adopts with a view to do justice between the parties without relying too much on technical considerations and with the object of avoiding delay in the disposal of industrial disputes. Therefore, we are satisfied that no distinction can be made between cases where no enquiry was held and cases where the enquiry has in fact been held. We must therefore reject the contention that as there was no enquiry in this case it was not open to the respondent to justify the discharge before the tribunal.

Re (iii).

The question whether there was go slow during the period from 27th November to 15th December, 1960 is a question of fact and the tribunal has come to the conclusion that there was go slow during the period. Ordinarily this Court does not go into findings of fact recorded by a tribunal unless there are special reasons, as, for example, where the finding is based on no evidence,—which of course is not the case here. Learned Counsel for the appellants however urges that the finding of the tribunal that the workmen concerned were guilty of go slow is perverse and that evidence which was relevant and material has been ignored. As the case involves the discharge of as many as 119 workmen we have decided to go broadly into the evidence to see whether the finding of the tribunal is patently wrong.

For this purpose we may first refer to the past history of the working of the respondent factory. It appears that till this Court condemned the practice of go slow in the case of *Bharat Sugar Mills*² it was not unusual in the State of Bihar for the workmen to give notice of go slow to employers as if it was a legitimate weapon to be used in matters of dispute between the employers and workmen. In the present case the respondent had complained as far back as 1950 that go slow was being resorted to. In 1950 a Court of enquiry was constituted to enquire into the question and it made a report that there was a slow down on the part of the workmen for several days in February March, 1950. It also came to the conclusion that the slow-down was instigated and sponsored by union leaders. In 1951, the workmen gave notice of go slow in case their demands were not fulfilled (*vide* Exhibit A-1). Similar notices were given in 1952 (*vide* Exhibit A-2), in 1954

(*vide* Exhibits A-3 and A-4) and in 1955 (*vide* Exhibits A-5, A-6 and A-7) and on some occasions threats of go-slow did actually materialise. Besides these notices the management had occasion to complain in 1955, 1957 and 1958 more than once that go-slow was being resorted to at the cane carrier. Thus it appears that resorting to go-slow was a common practice in this factory.

It is in the background of this persistent attitude of the workmen that we have to see what happened in November, 1960. We have already referred to the fact that the workmen were dissatisfied with the new incentive bonus scheme proposed by the respondent. It is not necessary to go into the merits of this new scheme which was proposed in September, 1960. But it appears that when there was dispute in the 1959-60 season on the question of how much cane should be crushed, the secretary of the union had accepted in a conference with the Assistant Labour Commissioner that there had been a drop in the amount of cane crushed, though he maintained that it was still the average crush. He had also stated then that the workmen were dissatisfied with the incentive bonus scheme in that season and had withdrawn the extra efforts they were putting in after the introduction of the incentive scheme for the first time in 1956-57. Further it was admitted by the secretary in his evidence that when the bonus scheme was proposed in 1960-61, it was considered by the workmen in a meeting and it was decided that if the new system was introduced without the consent of the workmen they would not put in any extra effort for giving more than what was the normal crush in the mill. The evidence also shows that there were conferences about the new scheme and at one stage the respondent suggested that the norm should be 30,000 maunds crush per day while the union was agreeable to 29,500 maunds per day. But there was no agreement in this behalf and so the workmen carried out their resolve not to put in extra efforts to give more than the average normal crushing per day. Thus the season which began in November, 1960 started with the withdrawal of extra efforts by the workmen which in plain terms means that the workmen were not prepared to do what they had been doing in the previous season 1959-60 and were slowing down production as compared to what it was in 1959-60. It is in the background of this history and this admission that we have to look broadly into the evidence to see whether the tribunal's conclusion that there was go-slow is justified.

The main contention on behalf of the respondent in this connection is that what one has to see is what is called crushing speed for a day of 24 hours and it is this crushing speed which would determine whether there was go-slow during the period in dispute. It has been urged that crushing speed per 24 hours is different from the actual crushing per day or the average crushing for a period, for the actual crushing per day from which the crushing speed is arrived at depends on a number of factors, particularly it depends on the amount of stoppages that take place during the day and if there are more stoppages the actual crushing on a particular day would necessarily go down. Crushing speed per twenty-four hours on the other hand is arrived at by excluding the stoppages and then working out what would be the amount of cane crushed in 24 hours if there had been no stoppages. The case of the respondent further is that when it gave the notice of 15th December, 1960 asking for a crush of 32,000 maunds per day it really meant that the workmen should work in such a way as to give a crushing speed of 32,000 maunds per day, though the words "crushing speed" were not actually used in the notice. It is however pointed out that the notice when it mentions 32,000 maunds as the normal crush expected per day excluded stoppages other than those due to over-loading or under-loading of the cane carrier. Therefore, the respondent wanted the workmen to give a crushing speed of 32,000 maunds per day which would exclude stoppages, the only exception being stoppages due to over-loading or under-loading, which, according to the respondent, is due to the deliberate action of the cane carrier workmen to cause stoppages. We think that this explanation of what the respondent meant when it gave the notice of a verage daily crush of 32,000 maunds is reasonable, for it is impossible to accept that 32,000 maunds were required to be crushed irrespective of stoppage beyond the control of the workmen. Further it is not in dispute

that the labour force was more or less the same throughout these years, and therefore we have to see whether during the period from 27th November to 15th December 1960, there was any significant drop in the crushing speed. If there was such a significant drop that could only be due to go slow tactics which have been euphemistically called withdrawal of extra efforts.

It is necessary therefore to look at the charts produced in this case to determine this question. The appellants mainly rely on chart Exhibit W 3. That is however a chart of actual crushing per day during the period from 1954-55 to 1960-61 and has nothing to do with crushing speed which in our opinion would be the determining factor in finding out whether there was go slow. The actual crush may vary as we have already said due to so many factors, particularly due to stoppages for one reason or the other. The respondent produced another chart Exhibit W 4 which shows the crushing speed for the entire season from 1954-55 to 1959-60. We consider that it would not be proper to take the figures for the years 1956-57 to 1959-60 in which years incentive bonus schemes were in force and which according to the workmen resulted in extra efforts on their part. But the figure of 1954-55 and 1955-56 would be relevant because in these years there was no incentive bonus scheme and no night weightment of carts. The workmen have also produced a chart showing cane crushed, actual crushing days and crushing per day, but this chart does not show the crushing speed and does not take into account the stoppages. It merely shows the actual number of working days and the average per day. That however would not be an accurate way of finding out whether in fact there was go slow during the period with which we are concerned. The respondent's chart Exhibit W 4 while showing the same amount of actual crushing also shows what would be the crushing speed per 24 hours after excluding stoppages. This chart in our opinion is the proper chart for determining whether there was go slow during the relevant period. Now according to this chart (Exhibit W-4) the daily average crushing speed in 1954-55 was 29,784 maunds and in 1955-56, 30,520 maunds without incentive bonus and without night weightment of carts. It appears that from the middle of 1959-60 season night weightment of carts started and it is not in dispute that that resulted in an increase in the daily crushing and this increase is put at over 2,000 maunds per day by the respondent, the secretary of the union admitted that this would result in an increase of about 2,500 maunds per day. We have already said that in the years 1954 and 1955 there was no incentive bonus and if these figures are accepted as giving the average crushing speed per day (when there was no incentive bonus and no weightment of carts at night) it would in our opinion be not improper to accept that the crushing speed with night weightment of carts would be in the neighbourhood of 32,000 maunds per day in view of the admission that night weightment of carts resulted in an increase of crushing by about 2,000 maunds to 2,500 maunds per day. Therefore, when the respondent gave notice on 15th December, 1960 that the average crushing per day should be 32,000 maunds excluding stoppages (except those due to over loading or under loading of the cane carrier, for which the workmen would be responsible) it cannot be said that the respondent had fixed something which was abnormal. It is true that when negotiations were taking place in connection with the incentive bonus scheme for the year 1960-61, the respondent was prepared to accept a crushing speed of 30,000 maunds per day above which the incentive bonus scheme would apply. That is however easily understood for a proper incentive bonus scheme always fixes a norm which is slightly lower than the average in order that there may be greater incentive to labour to produce more than the average. Even so, when the incentive bonus scheme for 1960-61, was not acceptable to the workmen and they had already decided to withdraw what they called extra effort, the respondent would not be unjustified in asking for the full average crushing speed based on the production of the years 1954-55 and 1955-56, when there was no incentive bonus scheme and no night weightment of carts.

It has been urged on behalf of the appellants that the crushing speed of 32,000 maunds per 24 hours is not correctly arrived at for it does not take into account half

hour's rest per shift which is permissible under section 55 (1) of the Factories Act LXIII of 1948. Thus, according to the appellants, crushing speed should be worked out on 22½ hours per day and the crushing will then be less by 1/16th and will only come to 30,000 maunds per day. Reliance in this connection is placed on section 55 (2) of the Factories Act, which lays down that,

"the State Government may by written order and for the reasons specified therein exempt any factory from the provisions of sub-section (1) so however that the total number of hours worked by a worker without an interval does not exceed six".

It is therefore urged that the workmen were entitled to half an hour's rest per shift in any case because the shift was for eight hours. The respondent on the other hand relies on section 64 (2) (d) of the Factories Act and its case is that the State Government had made Rules under that provision in connection with sugar factories, which apply to it. Section 64 (2) (d) is in these terms :—

"The State Government may make Rules in respect of adult workers in factories providing for the exemption, to such extent and subject to such conditions as may be prescribed—

* * * * *

(d) of workers engaged in any work which for technical reasons must be carried on continuously from the provisions of sections 51, 52, 54, 55 and 56 ;

* * * * *

We are of opinion that this provision in section 64 (2) (d) being a special provision will over-ride both sub-sections (1) and (2) of section 55, for it gives power to the State Government by making Rules to exempt certain types of factories from the application of the whole of section 55, subject to such conditions and to such extent as the Rules may provide. It appears that Rules were framed in this behalf by the Government of Bihar in 1950 by which sugar factories were exempted from the application of section 55 for purposes of handling and crushing of cane, among others, subject to the conditions that the workers concerned shall be allowed to take light refreshment or meals at the place of their employment, or in a room specially reserved for the purpose or in a canteen provided in the factory, once during any period exceeding four hours. Thus cane crushing operations are exempt from section 55 (1) and section 55 (2) subject to the condition mentioned above. We may also refer to section 64 (5) which lays down that the Rules made under this section shall remain in force for not more than three years. The Rules to which reference has been made are of 1950; but there is nothing to show that these Rules were not continued after every interval of three years and the position that the exemption applies to sugar factories even now as provided in these Rules was not disputed. We shall therefore proceed on the basis that the exemption applied to sugar factories in Bihar. In view of this, the workmen cannot claim half an hour's rest per shift as urged on their behalf, though some time must be allowed for refreshment or light meals as provided in the provision granting exemption. This means that a few minutes would be allowed to each individual in turn in each shift for light refreshment or meals in such a way that the work does not stop. If we make a total allowance of half an hour or so in this connection the average crushing speed would be reduced to slightly over 31,000 maunds per day and that is all the adjustment that the appellants can claim in view of the exemption under section 64 (2) (d).

Let us now turn to the actual position between 27th November and 15th December, 1960. This will appear from chart Exhibit W-7. That chart shows a crushing speed of 29,859 maunds per day from 10th to 26th November, when, according to the respondent, there was only mild go-slow. We are however concerned with the period from 27th November to 15th December, 1960 and the crushing speed for 24 hours during that period was 27,830. Now if we take the average crushing speed as 32,000 maunds per 24 hours without any adjustment or even a little over 31,000 maunds with adjustment following upon the rule relating to exemption from section 55, there is certainly a significant drop in average crushing speed during this period. Further we find that there is a significant drop even as compared to the period between 10th to 26th November, 1960, inasmuch as the drop was over

2,000 maunds per day. Therefore it cannot be said that the tribunal was incorrect in its conclusion that there had been go slow during the period from 27th November to 15th December. It may be added that when comparisons are made on the basis of crushing speed and the labour force is more or less constant, as is the case here other minor factors to which our attention was drawn on behalf of the appellants during argument do not matter at all. Even if we take the figure of 30,000 maunds as the crushing speed which the respondent had put forward at the time of the discussion on the incentive bonus scheme, we find that though there was not much difference during the period from 10th November to 26th November, there was a significant drop of over 2,000 maunds per day from 27th November to 15th December. Looking at the matter in this broad way—and that is all that we are prepared to do, for we are examining a finding of fact of the tribunal,—we cannot say that its conclusion that there was go slow between 27th November and 15th December, is not justified.

Finally it is urged that notice was given to the workmen on 15th December and they were discharged on 17th December, 1960 without giving them a chance to give the necessary production as desired in the notice. But as we have already indicated, the charge in the notice of 15th December, was that the workmen had been going slow from 27th November, and they were asked to give an undertaking to improve and the respondent was apparently willing to overlook the earlier lapse. Even assuming that the demand of an undertaking was unjustified, it does appear that the attitude of the workmen was that they would do no better, and in those circumstances they were discharged on 17th December, 1960 on the basis of misconduct consisting of go slow between 27th November, and 16th December, 1960. That misconduct has been held proved by the tribunal and in our opinion that decision of the tribunal cannot be said to be wrong. In the circumstances the tribunal was justified in coming to the conclusion that the discharge was fully justified.

In this view of the matter, the appeal fails and is hereby dismissed. In the circumstances we order parties to bear their own costs.

V K

Appeal dismissed

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT:—P. B. GAJENDRAGADKAR, *Chief Justice*, K. N. WANCHOO, M. HIDAYATULLAH AND V. RAMASWAMI, JJ.

Purshottam H. Judye and others

.. Appellants*

v.

V. B. Potdar the Authority appointed under the

Payment of Wages Act and another

... Respondents.

Payment of Wages Act (IV of 1936), section 2 (vi) (d), 2 (6)—Scope—Wages—Gratuity payable to workmen made under an award by Industrial Tribunal—Application by workmen for recovery of gratuity—Application after employer-newspaper ceasing publication—Amount recoverable under the Act as wages—'Instrument' in payable under an 'instrument' includes an award of industrial adjudication—Gratuity payable under an award—Not amounts to payable under any law or contract.

Words and Phrases—'Instrument.'

On the question whether the workmen are entitled to apply to the Authority appointed under the Payment of Wages Act for the recovery of the amount of gratuity due to them under an award passed between them and their employer, where the application was made by the workmen after the employer-newspaper ceased publication and where the award was held to be binding on the parties.

Held, The workmen are entitled to apply under section 2 (vi) (d) for recovering gratuity due under an award as wages and the word 'instrument' in the clause would include awards made by Industrial Courts of competent jurisdiction.

Ordinarily the word 'instrument' would refer to documents executed by the parties. But if the context clearly indicates that the word is used in a much larger sense, that context must be taken into account and a comprehensive interpretation must be placed upon that word.

Having regard to the object which the Legislature had in mind in widening the scope of definition of the word 'wages' by the amendment in 1957, it would not be unreasonable to hold that the word 'instrument' has a wider denotation in the context and would include an award and the word cannot be confined only to documents executed as between the parties.

The definition of 'wages' is an inclusive definition and remuneration which may have been prescribed under the award amounts to wages under section 2 (vi). Section 2 (6) lays down that it applies to categories of gratuity other than those specified in sub-clause (d) and that clearly means that certain categories of gratuity are included in section 2 (vi) (d), gratuity which may be payable to an employee by reason of the termination of his employment provided it is shown that it is payable under any law, contract, or instrument.

An award made by industrial adjudication framing a scheme of gratuity, becomes enforceable under sections 18 and 19 of the Industrial Disputes Act of 1947; and in that sense, it is a scheme which is enforceable by virtue of operation of law. But that would not justify the conclusion that gratuity itself is payable under any law. It is payable under an award which is made enforceable by section 18 of the Industrial Disputes Act. Therefore, it cannot be said that the gratuity in the instant case is payable under any law.

Though it is well settled that awards have, on many occasions, the effect of altering or modifying the contractual terms of employment between an industrial employer and his employees, it would be difficult to hold that the award as such is a contract, within the meaning of section 2 (vi) (d).

Appeal from the Judgment and Order dated the 14th June, 1961, of the Bombay High Court in Special Civil Application No. 1285 of 1960.

S. B. Naik, K. Rajendra Chaudhuri and K. R. Chaudhuri, Advocates, for Appellants Nos. 1, 2, 4—7, 9—13, 15—17 and 19—34.

S. V. Gupte, Solicitor-General of India, (B. R. Agarwala, Advocate, and H. K. Puri, Advocate, for Gagart & Co., with him), for Respondent No. 2.

26th October, 1965.

* C.A. No. 461 of 1963.

The Judgment of the Court was delivered by

Gajendragadkar, C J—The short question of law which arises in this appeal is whether workmen are entitled to apply to the Authority appointed under the Payment of Wages Act, 1936 (IV of 1936) (hereinafter called 'the Act') for the recovery of the amount of gratuity due to them under an award passed between them and their employer. This question has been answered by the Bombay High Court in the negative and the appellants Purshotam H Jadye and 34 others, who have come to this Court with a certificate granted by the said High Court, contend that the view taken by the High Court is not justified on a fair and reasonable construction of section 2 (vi) (d) of the Act. Respondent No 1 is Mr V B. Potdar, the Authority appointed under the Act, whereas respondent No. 2, the Bombay Chronicle Co., Private Ltd., is the employer of the appellants.

Respondent No 2, a company having its registered office at Red House, Horniman Circle, Fort, Bombay, were the printers and publishers of the 'Bombay Chronicle', an English Daily, which used to be published in Bombay until the 5th April, 1959. On that day, the paper discontinued its publication. The appellants are the former employees of respondent No 2. In a reference made to the Industrial Tribunal, Bombay under the Industrial Disputes Act, an award was pronounced by the said Tribunal on the 28th September, 1949, framing a scheme of gratuity payable to the appellants. This award directed respondent No 2 to pay gratuity to the appellants on terms and conditions prescribed by it. It appears that respondent No 2 terminated this award on the 29th February, 1952. After the 'Bombay Chronicle' ceased publication, the appellants moved respondent No 1 under the Act by several applications for payment of the gratuity due to them. These applications were made in July and August, 1959.

Respondent No 2 raised a preliminary objection against the competence of the appellants' applications. It was urged on its behalf that the amounts claimed by the appellants were not wages within the meaning of section 2 (vi) (d) of the Act and as such the applications were incompetent. Respondent No. 1 has rejected the contention raised by respondent No 2, and has held that the applications made by the appellants were competent and he had jurisdiction to deal with them on the merits.

Respondent No 2 then moved the Bombay High Court by a Special Civil Application No 1285 of 1960 under Articles, 226 and 227 of the Constitution. It was urged before the High Court by respondent No 2 that the view taken by respondent No 1 about the competence of the applications made by the appellants before him was contrary to law. This plea has been upheld by the High Court with the result that the finding recorded by respondent No 1 on the question about the competence of the applications made by the appellants has been reversed and the applications themselves have been ordered to be dismissed. It is this finding which is challenged before us by Mr Naik on behalf of the appellants. The question thus raised for our decision lies within a very narrow compass. Does the claim made by the appellants for payment of gratuity due to them under an award fall within section 2 (vi) (d) of the Act?

It is well known that the Act was passed in 1936 to regulate the payment of wages to certain classes of persons employed in industry. The object of the Act obviously was to provide a cheap and speedy remedy for employees to whom the Act applied, *inter alia*, to recover wages due to them, and for that purpose, a Special Tribunal has been created. Section 15 provides for making such applications and it prescribes the manner and method in which the applications have to be tried. Section 2 (vi) defines 'wages' thus —

'wages' means all remuneration (whether by way of salary, allowances or otherwise) expressed in terms of money or capable of being so expressed which would, if the terms of employment, express

or implied, were fulfilled, be payable to a person employed in respect of his employment or of work done in such employment, and includes—

(a) any remuneration payable under any award or settlement between the parties or order of a Court ;

(b) any remuneration to which the person employed is entitled in respect of overtime work or holidays or any leave period ;

(c) any additional remuneration payable under the terms of employment (whether called a bonus or by any other name);

(d) any sum which by reason of the termination of employment of the person employed is payable under any law, contract or instrument which provides for the payment of such sum, whether with or without deductions, but does not provide for the time within which the payment is to be made ;

(e) any sum which the person employed is entitled under any scheme framed under any law for the time being in force.”

The said section further provides that certain categories of payment made to the employees will not be included in the definition of “wages” prescribed by section 2 (vi). Sub-clauses (1) and (6) are relevant for our purpose. They read thus:—

“(1) Any bonus (whether under a scheme of profit sharing or otherwise) which does not form part of the remuneration payable under the terms of employment or which is not payable under any award or settlement between the parties or order of a Court.

* * * * *

(6) Any gratuity payable on the termination of employment in cases other than those specified in sub-clause (d).”

It will be noticed that the definition of “wages” is an inclusive definition. It includes within its purview categories of payments prescribed by clauses (a) to (e) and excludes from its purview categories of payments prescribed by sub-clauses (1) to (6). It is plain that remuneration payable to an employee under an award or settlement amounts to wages within the meaning of this definition. Similarly, bonus paid to the employees under an award amounts to wages. That is the effect of sub-clause (1). Any additional remuneration payable under the terms of employment is covered by sub-clause (c) and it is made clear by this sub-clause that it would be treated as such additional remuneration even if it is called a bonus or by any other name. Sub-clause (1) refers to bonus which is not such additional remuneration; it is bonus to which the employees are entitled under the principles evolved by industrial adjudication. This bonus may be under a scheme of profit sharing or otherwise. If such a bonus forms part of the remuneration payable under the terms of the employment, it is included in the definition. Similarly, if such bonus is payable under any award or settlement between the parties or order of the Court, it is included within the definition. Thus, it is clear that remuneration which may have been prescribed by an award amounts to wages under section 2 (vi). Likewise, bonus properly so-called, which is payable under the award, is also included within the definition prescribed by section 2 (vi). That is one aspect of the matter which it is necessary to bear in mind in dealing with the question raised before us.

The other consideration which is relevant is that sub-clause (6) which provides for the exclusion of certain categories of gratuity necessarily assumes that the categories of gratuity other than those specified by it would fall under section 2 (vi) (d). This sub-clause clearly says that it applies to categories of gratuity other than those specified in sub-clause (d), and that clearly means that certain categories of gratuity are included in sub-clause (d).

While considering the relevance and significance of this sub-clause, it may be relevant to point out that under the original definition contained in section 2 (vi) any gratuity payable on discharge was expressly excluded from its purview. The present definition which has been introduced in the Act by Act LXVIII of 1957 is obviously intended to widen the scope of the definition; and one of the features

of this comprehensive definition is that it does take within its purview certain categories of gratuity payable to the employees

Bearing in mind these considerations, let us now revert to sub-clause (d) which has to be construed for deciding the point raised before us by the appellants. This sub-clause refers to any sum which by reason of termination of employment is payable to the employee. The expression "by reason of the termination of employment" must, in the context, have the same meaning as the expression "payable on the termination of employment" which is used in sub-clause (6). In other words, gratuity which may be payable to an employee by reason of the termination of his employment would fall under sub-clause (d), provided it is shown that it is payable under any law, contract, or instrument. It is true that an award made by industrial adjudication framing a scheme of gratuity, becomes enforceable under sections 18 and 19 of the Industrial Disputes Act XIV of 1947, and in that sense, it is a scheme which is enforceable by virtue of the operation of law. But that would not justify the conclusion that the gratuity itself is payable under any law. It is payable under an award which is made enforceable by section 18 of the Industrial Disputes Act. Therefore, it cannot be said that the gratuity in the present case is payable under any law.

Can it be said to be payable under a contract is the next question to consider. Here again though it is well settled that awards have on many occasions the effect of altering or modifying the contractual terms of employment between an industrial employer and his employees, it would be difficult to hold that the award as such is a contract. It is true that sometimes, the terms prescribed by industrial awards are treated as terms of a statutory contract which govern the relationship between the employer and the employees. But the description of the award as a statutory contract is merely intended to emphasise the fact that the terms prescribed by the award are enforceable as though they were terms of employment evolved by industrial adjudication for the parties. Therefore we do not think it would be reasonably possible to hold that the award which frames a scheme for payment of gratuity can be said to amount to a contract within the meaning of the relevant sub-clause.

That takes us to the question as to whether an award can be appropriately described as an instrument which provided for the payment of gratuity. It is true that an instrument normally indicates a document executed as between the parties to it. But if the intention of the Legislature was to confine the word "instrument" to such documents alone, it would have said "under any law, contract or other instrument". The use of the word "other" would have justified the contention that the instrument should be of the same category as a contract, and cannot take in a document which evidences adjudication by an Industrial Court. The scope of the denotation of the word "instrument" has to be judged in the light of the general object which the amended definition of "wages" is intended to achieve. As we have already indicated, when the Legislature amended the definition of "wages" in 1957, it obviously intended to widen the scope of that expression. Remunerations payable under the awards have been included within the definition, bonus payable under the awards also falls within the definition, and some categories of gratuity also fall within sub-clause (d). That is the obvious implication of sub-clause (6). Having regard to the object which the Legislature had in mind in widening the scope of the definition we think it would not be unreasonable to hold that the word "instrument" has a wider denotation in the context and cannot be confined only to documents executed as between the parties. The scheme of the definition and the context of sub-clause (d) read with sub-clause (6) seem to suggest that the word "instrument" would include awards made by Industrial Courts of competent jurisdiction. On principle, it is difficult to imagine that whereas a bonus claimable under an

award can be recovered by employees by moving the authority under section 15, a gratuity claimable under an award cannot be so recovered.

In construing the word "instrument" in a narrow sense, the High Court has referred to the decision in *Jodrell v. Jodrell*¹. In that case, Lord Romilly, M.R., has observed that an order of Court is not an instrument within the meaning of the Apportionment Act, 4 and 5 Will. 4, cl. 22. This decision undoubtedly shows that the word "instrument" can have a narrow meaning if the context of the statutory provision in which it occurs indicates that way. On the other hand, under the Conveyancing Act, 1881 (44 and 45 Vict., c. 41), section 2 (xiii), "instrument" includes deed, will, inclosure, award, and Act of Parliament, (*vide* Stroud's Judicial Dictionary, p. 1473). It is thus clear that in construing the word "instrument", we must have regard to the context in which the word occurs. No one can suggest that the word "instrument" can always and in every case include an award or an order of adjudication. On the contrary, as we have already indicated, ordinarily, the word "instrument" would refer to documents executed by the parties. But if the context clearly indicates that the word "instrument" is used in a much larger sense, that context must be taken into account and a comprehensive interpretation must be placed upon that word. We are, therefore, satisfied that the High Court was in error in coming to the conclusion that the word "instrument" did not include an award and that made the applications made by the appellants before respondent No. 1 incompetent.

In the result, the decision of the High Court on this point is reversed and that of respondent No. 1 restored with costs throughout. Respondent No. 1 should now proceed to deal with the appellants' applications in accordance with law.

Before we part with this appeal, we ought to add that the High Court has found that though the award has been terminated by respondent No. 2, it still continues to exist and is binding on the parties. This finding of the High Court has not been challenged before us by the learned Solicitor-General who appeared for respondent No. 2, and we think rightly.

V.S.

Appeal allowed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—P. B. GAJENDRAGADKAR, *Chief Justice*, K. N. WANCHOO, M. HIDAYATULLAH AND V. RAMASWAMI, JJ.

The Cachar Chah Sramik Union, Silchar, Assam

.. *Appellant**

v.

The Management of the Tea Estate of Cachar
Assam and others

.. *Respondents.*

Industrial Disputes Act (XIV of 1947)—Industrial dispute—Standing Orders—Lay-off—Provision for "other causes beyond control"—Sudden slump in world market and consequent financial difficulties—Falls within the scope of Standing Order—Retrenchment—Effectuated prior to enactment of section 25-F—Principle of payment of retrenchment compensation, equally applicable—Quantum of compensation—Within the discretion of the Tribunal—No interference by Courts unless vitiated by errors of law or legal principles in its determination.

The Industrial Tribunal held that the financial crisis of the Management Tea estate was genuine and was not the result of any manipulation and that the management was entitled under clause (B) (a) (i) and (iii) of the Standing Orders to lay off the workmen for an indefinite period. The

1. (1868-69) 7 E.C. 461.

*C.A. No. 969 of 1963.

Tribunal further held that the management was also entitled to retrench workmen under clause 9 of the Standing Orders. The Tribunal considered that even if the lay-off and retrenchment were *bona fide* and justified, the workmen were entitled to a reasonable compensation and fixed the compensation at the rate of one week's pay for every four months of unemployment. Finally the Tribunal held that the provision of khet land and other amenities like housing and medical facilities available to workmen should be taken to adequately represent one week's wages. The Union appealed.

Held, the lay off would be justified under the provisions of Clause 8 (a) (i) and (ii) of the Standing Orders. The reference therein to "other causes beyond his control" would cover a case of sudden slump in the world market and the consequent financial difficulties of the tea estates.

Though the retrenchment was effected long prior to the enactment of section 25 F laying down payment of retrenchment compensation, the principle would equally apply.

The quantum of compensation is a matter primarily for the Tribunal to estimate and it is not open to Court to go into this question unless it is shown that the Tribunal has committed any error of law or legal principle in deciding it.

The Tribunal has estimated the amount of compensation as one week's wages for every four months of unemployment and it has not been shown on behalf of the workmen that in making this estimate the Tribunal has committed any error of law or applied any wrong principle.

Appeal by Special Leave from the Award, dated the 1st November, 1959, of the Industrial Tribunal, Assam, in Sub-References Nos 25 to 39, 41, 43 to 45, 47 to 51, 54 to 57, 59 to 61, 63 to 67, 69 to 73, 76 and 91 of 1957 and 15 of 1958.

C. P. Agarwala, Senior Advocate (*D L Sen Gupta* and *K. P. Gupta*, Advocates, with him), for Appellant.

M C Setalvad, Senior Advocate (*Purnendu Chaudhri*, *R C Dutta* and *D N Mukherjee*, Advocates, with him), for Respondents Nos 1-5, 7, 9, 11, 14, 15, 20, 22, 25-28, 31 (1), 31 (4), 31 (6), 31 (8), 31 (10) to 31 (14), 32, 33 (2), 34, 35, 37-40, 42 (2)-42 (10), 43 and 44.

R. C. Dutta and *D N Mukherjee*, Advocates, for Respondents Nos 8, 12, 23 and 42 (1).

D N. Mukherjee and *D N Gupta*, Advocates, for Respondents Nos 6 and 31 (5).

Dipak Datta Choudhri, Advocate, for Respondent No 33 (1).

S N Mukerji, Advocate, for Respondent No 6 (1).

Sukumar Ghose, Advocate, for Respondents Nos 10, 13 (2), 13 (3), 19, 30, 31 (2) (1), 31 (5) (1), 31 (6) (1), 31 (14) (1), 35 (1) (1), 35 (2) (1), 35 (3) (1), 38 (1) (1), 38 (2) (1) and 43 (11).

B P. Maheshwari and *S. Murthy*, Advocates, for Respondents Nos 8 (1), 31 (9) (1) and 35 (6) (1).

The Judgment of the Court was delivered by

Ramaswami, J—This appeal is brought, by Special Leave, against the award of the Industrial Tribunal, Assam, published in Assam Gazette, dated 13th January, 1960, *vide* Assam Government Notification No 36 /55/690, dated 29th December, 1959, in References Nos 25 to 39, 41, 43 to 45, 47 to 51, 54 to 57, 59 to 61, 63 to 67, 69 to 73, 76 and 91 of 1957 and 15 of 1958.

During the period from June, 1951 to March, 1953, the entire tea industry in the Cachar District of Assam was subject to an unusual economic crisis. There was a steep rise in the cost of production due to increase of wages and introduction of subsidised rations. In October, 1949, a Tripartite Conference was held at Silchar and it was decided in this Conference that nearly 20 Tea Estates had become uneconomic and should be allowed to convert food concessions into cash at the rate of 0-4-6 per head per day. The need for re-adjustment of labour force

was also recognised in this Conference. The financial position of the Tea Estates however continued to cause anxiety to the Government. On 12th February, 1949, an *ad hoc* Committee was appointed which submitted its report on 13th September, 1950. In this report the Committee stressed the inability of the tea industry to bear the burden of subsidised food-stuffs. The Committee further found that the increase in production cost was considerable and the tea estates were compelled to borrow more money and the Scheduled Banks were finding it difficult to meet the demand. The Committee found that the yield of tea in Cachar District was 7 mds. per acre and in its view the absolute minimum yield which could be economic in Cachar was 8 mds. per acre. In view of the critical condition of the tea industry in Cachar another Committee named as 'The Cachar Plantation Committee' was constituted on 4th April, 1950. The report of the Committee was submitted on 4th January, 1951. The Committee recommended abandonment of uneconomic areas under tea and suggested offer of alternative employment to the surplus labour or provision of khet land, if available. The Committee also recommended a seven annas conversion rate per day in lieu of food concession for all estates and it was proposed that Government should undertake to supply foodgrains to tea estates at controlled wholesale rates. The Committee reached the finding that the average return to the shareholder was 2-2/3 per cent. and the remuneration to the managerial staff constituted a very small fraction of the total cost of production. Even according to the labour representatives on this Committee the labour costs represented 47 per cent. of the total cost of production of tea.

In the year 1951 there was a sudden recession in the world price of tea. Fluctuations commenced in the middle of June, 1951 and there was a rather rapid decline in prices of tea in November, 1951. Cachar prices came down from 1-10-1 per lb. on 30th October, 1951 to 1-2-11 per lb. on 17th March, 1952. The prices of Cachar tea ranged between 0-14-4 per lb. to 0-12-11 per lb. between June and August, 1952. In May the price came down to 0-12-3. After June, 1952, the price of Cachar tea ranged between 1-1-0 to 0-12-2. The decline in prices covered a long period and was unprecedented in its character. To add to the difficulties of the tea industry there was a notification under the Minimum Wages Act, dated 11th March, 1952, raising wages of labour substantially. A representation was made to the Government of India by Associations of Tea Producers in March and April, 1952, regarding the difficulties of the industry as a result of the steep fall in prices. The Government of India appointed a two-member Committee (known as the Official Team) to investigate into the matter. Before the team concluded its investigation the situation had taken a critical turn and the tea industry in Cachar was on the verge of a total collapse. By 22nd January, 1953, 82 out of 111 gardens in Cachar district had closed down. The Official team recommended conversion of food concessions into cash, arrangement for credit facilities through suitable co-operative banks and postponement of the implementation of the Plantation Labour Act for a period of two years. As regards the question of the revision of the minimum wage the tea industry was asked to make necessary representation to the State concerned. In its report, dated 31st January, 1953, the minimum wage Committee observed that the estates in Cachar District stood on an entirely different footing and expressed a fear that almost all of them were likely to go out of business if the existing low prices of tea continued for any length of time. Even at the time of the Minimum Wage Notification a number of estates were known to be uneconomic and the increase in wage rates resulting from the Notification was a severe blow to them. The hope that prices of tea would rise was completely belied and events so conspired that most of the estates turned out to be uneconomic. The Committee further observed that it was realised that labour could ill-afford to agree to any suggestion to reduce the existing minimum wage but the situation was such that drastic measures had to be considered in the interest of the labourers themselves.

It is to be noted also in this connection that Cachar labourers who have been settled on the estates for generations had alternative sources of income in common with the village folk in the neighbourhood. In pursuance of the recommendation of the Committee there was a revised notification, dated 9th February 1953 under the Minimum Wages Act with regard to all the tea estates in the district of Cachar and the uneconomic tea estates in the Assam Valley. The notification provided that there shall be no issue of food stuffs at concessional rates and no cash compensation as such in lieu thereof. But with a view to mitigate the hardship of labour due to suspension of food concessions the existing dearness allowance was raised temporarily for all Cachar tea estates at the rate of one anna for adults and six pies for minors for each working day. After the issue of the revised notification the economic condition of the tea estates improved and many tea estates started refunctioning. Many of the workmen who were retrenched were taken back in employment and others were provided alternative employment in tea estates outside Cachar District in the Assam Valley District or elsewhere.

The case of the Cachar Chah Sarmik Union (hereinafter called the Union) before the Industrial Tribunal was that there was no genuine crisis which could justify retrenchment, lay off or even reduction of working days in a week. According to the Union the financial crisis was manipulated by the management because of the notification under the Minimum Wages Act issued in March, 1952. The object of the management was to force the Government to revise that notification and at the same time to crush the growing trade union movement. It was contended that the introduction of short working hours and retrenchment were unfair labour practices. The Union claimed compensation on the ground that the measures taken by the management were wholly unjustified. It was alternatively contended that even if the measures were justified, the workmen were entitled to compensation on account of involuntary unemployment which they had suffered for no fault of theirs. The opposite view was put forward by the management and it was contended on its behalf that it was compelled to reduce the number of working days and, in some cases, to resort to retrenchment because there was a real and sudden financial crisis in the industry and the industry could not be run with profit without resort to these measures. Upon these rival contentions the Industrial Tribunal held in the first place, that the financial crisis was genuine and was not a result of any manipulation and that the management was entitled under clause 8 (a) (i) and (iii) of the Standing Orders to lay off the workmen for an indefinite period. The Tribunal further held that the management was also entitled to retrench workmen under clause 9 of the Standing Orders. The Tribunal considered that even if the lay off and retrenchment were *bona fide* and justified, the workmen were entitled to a reasonable compensation and fixed the quantum of compensation at the rate of one week's pay for every four months of unemployment. Finally the Tribunal held that the provision of khet land and other amenities like housing and medical facilities available to the workmen should be taken to adequately represent one week's wages. After laying down these principles the Industrial Tribunal examined the case of each individual garden and awarded compensation in some cases while refusing to grant any compensation in others.

On behalf of the appellant Union Mr. Agarwala submitted, in the first place that clause 8 (a) of the Standing Orders had no application to the present case and the Tribunal was not justified in holding that the financial difficulty facing the tea estates was a matter beyond the control of the management and the workmen could not, therefore, be laid off by the management under this clause. The relevant portion of clause 8 reads as follows:

* Closing and re opening of sections of the industrial establishments and temporary stoppages of work, and the rights and liabilities of the employer and workmen arising therefrom

(a) (i) The manager may at any time in the event of fire, catastrophic, breakdown of machinery, stoppage of power or supply, epidemic, civil commotion, strike, extreme climate conditions or other causes beyond his control, close down either the factory or field work or both without notice.

* * * * *

(iii) In cases where workmen are laid off for short periods on account of failure of plant or a temporary curtailment of production, the period of unemployment shall be treated as compulsory either with or without pay, as the case may be; when, however workmen have to be laid off for indefinitely long period their services may be terminated after giving them due notice or pay in thereof."

support of this argument Mr. Agarwala referred to the decision of this Court *Workmen of Dewan Tea Estate v. Their Management*.¹ But the ratio of that decision has no application to the present case in which the material facts are different. In *Workmen of Dewan Tea Estate v. Their Management*¹ there was no sudden slump in the price of tea but there was difficulty experienced by the management in obtaining financial facilities from banks. It was an individual case of management experiencing financial difficulty and it was, therefore, held by this Court that the stoppage of financial assistance will not fall within the phrase "stoppage of power or supply" in clause 8 (a) (i) of the Standing Orders. It was also pointed out in that case that there was no evidence produced on behalf of the management to substantiate its plea of non-availability of finance. There was also no evidence on the record to justify the assumption of the management that the financial difficulty faced by it was beyond its control. The material facts in the present case are different. It has been found by the Industrial Tribunal that there was a sudden slump in the price of tea in the world markets, that the recession of prices of tea commenced in the middle of 1951 and continued during the whole of 1952 for a period of about 18 months. The low level of prices reached in May, 1952, was unprecedented. The Tribunal has also found that the economic crisis of the tea industry in Cachar region was real and was caused by reasons beyond the control of the management of the tea estates. In our opinion, the last part of clause 8 (a) (i) which refers to "other causes beyond his control" would cover a case of sudden slump in the world market and the consequent financial difficulties of the tea estates. We accordingly hold that the lay-off in the present case was justified by clause 8 (a) (i) and (iii) of the Standing Orders and the argument of Mr. Agarwala on this aspect of the case is not warranted.

As regards retrenchment, we are satisfied that the management had also the additional power of retrenching workmen under clause 9 of the Standing Orders which reads as follows:

"Termination of employment and notice thereof to be given by the employer and workmen.

Notice of termination of employment, whether by Manager or by worker, shall be given equal to the wage-period of the worker concerned.

Provided that—

(a) the Manager may terminate the employment of a worker forthwith and pay his wages for the wage-period (equivalent to his average earnings over the preceding period of three months) in lieu of notice.

(b) Notice of termination of employment shall be necessary only in case of permanent workers and not in the case of outside or temporary workers except in so far as is laid down in any agreement entered into between the Manager and such outside or temporary workers.

(c)

(d) Where the employment of any worker is terminated the wages earned by him and other dues, if any, shall be paid before the expiry of the second working day on which his employment is terminated.

....."

The Tribunal has found that there was no victimisation or unfair labour practice or *mala fide* on the part of the management in closing the gardens or in making the retrenchment. Mr Agarwala on behalf of the appellant did not

challenge the finding of the Tribunal on this point, but learned Counsel argued that even if the management was justified, the workmen were entitled to payment of compensation according to the scale laid down in section 25 F of the Industrial Disputes Act. It was conceded by learned Counsel that Chapter V-A which contains section 25 F came into force on 24th October, 1953, by amending Act XLIII of 1953 and the retrenchment in the present case was effected long before that date. It was however, contended that the principle embodied in section 25-F should be applied in the present case. It was said that by enacting Chapter V A the Legislature was merely recognising the practice of payment of compensation by Labour Tribunals before the date of the amendment and the Legislature decided by the amendment, to standardise the payment of compensation by prescribing a statutory rule in that behalf (See *The Indian Hume Pipe Co., Ltd v The Workmen and another*¹). There is substance in the argument put forward on behalf of the appellant and the Tribunal has also applied this principle in granting compensation to the retrenched workmen even though the case was not attracted by section 25-F of the Industrial Disputes Act. But the Tribunal has taken the view that one week's wages for every four months of unemployment was adequate compensation. The contention of the appellant is that the compensation should have been awarded on the scale laid down in section 25-F of the Industrial Disputes Act. We are unable to accept this argument as correct. As pointed out by this Court in *The Indian Hume Pipe Co., Ltd v The Workmen and another*,¹ Industrial Tribunals had been awarding compensation even before the enactment of section 25-F but there was no uniformity or certainty in the matter and in determining the amount of compensation the Tribunals considered a variety of relevant factors. It is manifest that in determining the amount of compensation the Tribunals exercised complete discretion and took into account whatever factors they considered relevant. In the present case, the Tribunal has estimated the amount of compensation as one week's wages for every four months of unemployment and it is not shown on behalf of the appellant that in making this estimate the Tribunal has committed any error of law or applied any wrong principle.

As regards the compensation to retrenched workmen, the Tribunal has stated in para 135 of the Award that the amenities granted to them included undisturbed possession of residential quarters and khet lands. They were also granted medical relief, fuel and other forest produce even during the period of suspension of work. The Tribunal did not attempt to evaluate accurately the pecuniary value of all these concessions but it has expressed the view that the value of these concessions would be roughly equal to one week's wages for every four months of employment and therefore the retrenched workmen were not entitled to any compensation in cash apart from any right to wages in lieu of a week's notice under clause 9 of the Standing Orders. On behalf of the appellant Mr Agarwala said that the retrenched workmen were entitled to get a larger amount of compensation than that awarded by the Tribunal. The quantum of compensation is, however, a matter primarily for the Tribunal to estimate and it is not open to this Court to go into this question unless it is shown that the Tribunal has committed any error of law or legal principle in deciding it. As regards the workmen who were subjected to short hours of work, the Tribunal has observed that they have been granted *ex gratia* payments which were, in several cases in excess of the total loss of wages by reason of the revision of the daily wages under the notification of 9th February, 1953, under the Minimum Wages Act. On behalf of the appellant reference was made by Mr Agarwala to the deposition of Mr R M Bipan at page 97, Part I that the *ex gratia* payment compensated merely for the minimum wages cut and not the loss to labour by the short work week. But the Tribunal having examined the entire evidence reached the conclusion that the *ex gratia* payment was in several cases in excess of total loss

of remuneration on account of the notification under the Minimum Wages Act. There is also undisputed evidence in this case to show that even in normal times short hours had to be imposed by employers upto a period of three days in a week in Cachar tea gardens. In this state of facts it is not possible for us to hold that the Tribunal was in error in holding that the *ex gratia* payment made by the management was sufficient compensation to the workmen who were not retrenched outright but who were put on short hours of work.

For the reasons expressed we hold that there is no merit in this appeal which is accordingly dismissed. We do not propose to pass any order as to costs.

V.S.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—K. SUBBA RAO, J. C. SHAH AND S. M. SIKRI, JJ.

The State of Kerala

.. *Appellant**

v.

N. Sami Iyer

.. *Respondent.*

Travancore-Cochin General Sales Tax (Amendment) Act (XII of 1957)—General Sales Tax Act (XI of 1125), section 3 (5)—Madras General Sales Tax Act (IX of 1939), section 3 (5)—General Clauses Act (1125), section 4 (c)—On 1st October, 1957 T.G. Act XII of 1957 repealing Madras Act IX of 1939 as in force in Malabar District and extending Act XI of 1125 to that area—Assessee, dealer in tobacco, who was residing in Malabar District during part of the assessment year 1957-58 paying purchase tax, on purchase of tobacco made by him, under Madras Act before its repeal—If acquires a right not to be taxed, during the assessment year 1957-58, except under the Madras Act even after its repeal.

During part of the assessment year 1957-58 the assessee, a dealer in tobacco, was residing in Malabar District and in that area the Madras General Sales Tax Act (IX of 1939) applied. Under that Act tobacco was assessable at the purchase point and section 3 (5) of the Madras Act provided that where a dealer had been taxed in respect of the purchase of any goods he shall not be taxed again in respect of any sale of such goods effected by him. During the assessment year 1957-58 the assessee paid tax at the purchase point on purchase of tobacco made by him under Madras Act IX of 1939 before its repeal. On 1st October, 1957 the T.C. General Sales Tax (Amendment) Act (XII of 1957) came into force which changed the Short Title of the Travancore Cochin General Sales Tax Act (XI of 1125) into General Sales Tax Act (XI of 1125) and extended it to the whole of the State of Kerala including the Malabar District and the Madras Act IX of 1939 as in force in Malabar District was repealed. Under Act XI of 1125 the taxable point specified for tobacco was the first sale in the State. Thus whereas previously the taxable point in respect of tobacco was the point of first purchase under the Madras Act, after Act XII of 1957 came into force the taxable point was the first sale in the State. For the assessment year 1957-58 the turnover of sales of the assessee consisting of tobacco was sought to be assessed under Act XI of 1125. The assessee objected on the ground that the goods were the subject-matter of purchases which had already been assessed at the point of purchase in his hands under the Madras Act and he was entitled to the benefit of section 3 (5) of that Act. He failed before the Sales Tax Authorities but the High Court in revision accepted his contention. On appeal to Supreme Court by Special Leave;

Held, the High Court was right in holding that the disputed turnover was not liable to tax.

By virtue of section 4 (c) of the General Clauses Act, 1125 the assessee continued to be liable to taxation under the Madras General Sales Tax Act in respect of the disputed turnover at the purchase point. To this liability would be attached a right; the right being that he would not be liable to be taxed in respect of any sale of goods which had been the subject-matter of purchase and taxation under the Madras Act.

26th October, 1965,

T G Act XII of 1957 did not manifest any intention to destroy the rights and liabilities acquired or incurred under the Madras Act. If the Legislature had any intention to override the right attached to the liability under section 3 (5) of the Madras Act it would have used more clear and precise words.

Appeal by Special Leave from the Judgment and Decree, dated 13th July, 1961 of the Kerala High Court in Tax Revision Case No. 44 of 1960.

Dr V A Seyid Muhammed, Advocate General, for State of Kerala,
(*M R Krishna Pillai*, Advocate, with him), for Appellant

Arun B Saharya and Sardar Bahadur, Advocates, for Respondent

The Judgment of the Court was delivered by

Sikri, J—This appeal by Special Leave is directed against the Judgment of the High Court of Kerala in Tax Revision Case No. 44 of 1960.

The respondent, N. Sami Iyer, hereinafter referred to as the assessee is a dealer in tobacco. He objected to the assessment of the turnover of Rs 7,757 54 for the assessment year 1957-58, *inter alia*, on the ground that the goods were the subject matter of purchases which had already been assessed at the point of purchase in the hands of the assessee. He failed before the Sales Tax Authorities but in a revision the High Court accepted his contention and held that his turnover was not liable to tax.

In order to appreciate the contention of the appellant it is necessary to mention a few facts. During the period 1st April, 1957 to 30th September, 1957, the assessee was residing in Malabar and in this area the Madras General Sales Tax Act (IX of 1939) applied. Section 3 (5) of this Act provides

The taxes under sub-sections (1) (1 A) and (2) shall be assessed levied and collected in such manner and in such instalments if any, as may be prescribed.

Provided that—

(i) In respect of the same transaction of sale the buyer or the seller, but not both as determined by such rules as may be prescribed, shall be taxed;

(ii) Where a dealer has been taxed in respect of the purchase of any goods in accordance with the rules referred to in clause (1) of this proviso he shall not be taxed again in respect of any sale of such goods effected by him.

It is common ground that tobacco was taxable at the purchase point under the Madras Act and that the turnover with which we are concerned had suffered taxation at that point under the Madras Act.

The Travancore Cochin General Sales Tax (Amendment) Act, 1957 (XII of 1957) came into force on 1st October, 1957. This Act changed the Short Title of the Travancore Cochin General Sales Tax Act (XI of 1125) to the General Sales Tax Act, 1125, and extended it to the whole of the State of Kerala, including Malabar District. Section 14 of Act XII of 1957 inserted section 26-A in Act XI of 1125 which reads as follows:

26-A *Transitory provisions*—(1) In the application of this Act to the Malabar District referred to in sub-section (2) of section 5 of the States Reorganisation Act 1956 during the financial year ending with 31st March 1958 the provisions of this Act shall be subject to the provisions contained in Schedule II.

(2) The Government may from time to time by notification in the Gazette add to alter or cancel Schedule II.

Schedule II is in the following terms:

1 Every registration effected and every licence issued under the Madras General Sales Tax Act 1939 or the Rules made thereunder in their application to the Malabar District referred to in sub-section (2) of section 5 of the States Reorganisation Act 1956 (hereinafter referred to as the 'Malabar area') and in force at the commencement of the Travancore Cochin General Sales Tax (Amendment) Act 1957 shall be deemed to have been effected or issued under this Act or the Rules made thereunder.

2. In calculating the total turnover for the financial year ending with 31st March 1958 of a dealer in the Malabar area for purposes of sub-section (3) of section 3 of this Act, the turnover

of the dealer under the Madras General Sales Tax Act, 1939 up to the commencement of the Travancore-Cochin General Sales Tax (Amendment) Act, 1957, shall also be taken into account

The effect of section 26-A and the Schedule, among other things, is that the dealer's registration and the licences are deemed to have been effected under this Act, and secondly, that the total turnover for the period 1st April, 1957 to 30th September, 1957, is to be taken into account under the General Sales Tax Act.

Act XII of 1957, by section 15 *inter alia* repealed the Madras General Sales Tax Act, 1939, as in force in the Malabar District, referred to in sub-section (2) of section 3 of the States Reorganisation Act, 1956. Section 3 (5) of the General Sales Tax Act, 1125, is in the same terms as section 3 (5) of the Madras General Sales Tax Act, reproduced above. Section 5 (vii) of the General Sales Tax Act (corresponding to section 5 of the Madras General Sales Tax Act) provides as follows :

"The sale of goods specified in column (2) of Schedule I shall be liable to tax under section 3, sub-section (1) only at such single point in the series of sales by successive dealers as may be specified by the Government by notification in the Gazette ; and where the taxable point so specified is a point of sale, the seller shall be liable for the tax on the turnover for which the goods are sold by him at such point and where the taxable point so specified is a point of purchase, the buyer shall be liable for the tax on the turnover for which the goods are bought by him at such point."

The description of item 2 in column (2) of Schedule I at the relevant time was "Tobacco other than Beedi Tobacco (Suka)."

In exercise of the powers conferred by section 5 (vii) the Government issued a notification No. HI-10674/57/RD-2 dated 28th September, 1957. The relevant portion of the notification reads as follows :—

"In exercise of the powers conferred by clause (vii) of section 5 of the General Sales Tax Act (XI of 1125) the Government of Kerala hereby specify the point mentioned in column 3 of the Schedule, hereto appended as the point liable to tax under section 3 (1) on the goods mentioned in column 2.

SCHEDULE.

Sr. No.	Description of goods.	Taxable point.
(1)	(2)	(3)
	Tobacco other than Beedi Tobacco (Suka)	1st sale in the State by a dealer who is not exempt from taxation under section 3 (3)."

The result of the above notification is that whereas previously the taxable point in respect of tobacco was the point of first purchase under the Madras Act, now the taxable point is the first sale in the State.

The learned Advocate-General, who appeared on behalf of the appellant, has raised two points before us : first, that in this case there was no right, much less a vested right, not to be taxed except under the Madras General Sales Tax Act ; the right if at all was to take advantage of the provisions of the repealed Act, namely, the proviso to section 3 (5) of the Madras Act. Secondly, he says that even if there was such a right, Act XII of 1957 manifests a contrary and different intention within the meaning of section 4 (c) of the General Clauses Act, 1125, and the disputed turnover is liable to taxation under Act XII of 1957. We may mention that section 4 (c) of the General Clauses Act, 1125, corresponds to section 6 (c) of the Indian General Clauses Act. It appears to us that by virtue of section 4 (c) the dealer continued to be liable to taxation under the Madras General Sales Tax Act in respect of the disputed turnover at the purchase point. For example, if for some reason he had not been assessed before Act XII of 1957 came into force, he would have been assessed under the Madras Act at the purchase point because a liability within the meaning of section 4 (c) would have been incurred by him. To this liability would be attached a right ; the right being that he would not be liable to be taxed in respect of any sale of goods which had been the subject-matter of a purchase and taxation under the Madras Act. In other words, he was liable to be assessed under the Madras Act in respect

of the purchase of goods but he had also a right not to be taxed again in respect of any sale of the same goods effected by him. Therefore, we repel the first argument of the learned Advocate General.

The next question that arises is whether Act XII of 1957 manifests a different intention. As observed by this Court in *State of Punjab v Mohar Singh*¹,

'when the repeal is followed by fresh legislation on the same subject we would undoubtedly have to look to the provisions of the new Act, but only for the purpose of determining whether they indicate a different intention. The line of enquiry would be not whether the new Act expressly keeps alive old rights and liabilities but whether it manifests an intention to destroy them.'

We cannot discern any intention in Act XII of 1957 to destroy the rights and liabilities acquired or incurred under the Madras General Sales Tax Act. The Second Schedule reproduced above shows that the intention was to preserve old rights such as registration and licences issued under the old Act. In our opinion, if the Legislature had the intention to override the right attached to the liability under section 3 (5) of the Madras General Sales Tax Act, it would have used more clear and precise words.

In the result we agree with the High Court that the turnover of Rs 7,757.54 is not liable to taxation. The appeal accordingly fails and is dismissed with costs.

V K

Appeal dismissed

THE SUPREME COURT OF INDIA (Civil Appellate Jurisdiction)

PRESENT.—P B GAJENDRAGADKAR, Chief Justice, K. N. WANCHOO,
M. HIDAYATULLAH, V. RAMASWAMI AND P. SATYANARAYANA RAJU, JJ.

The Management of Utkal Machinery Ltd.,

Appellant*

v

Workman, Santu Patnaik

Respondent

Industrial dispute—Reinstatement—Compensation in lieu of—Discharge of employee—Probation alleged by management—Work unsatisfactory during the period of probation—No enquiry as to unsatisfactory work—Employee alleging mala fides—Award of compensation by Labour Court—Interference in appeal

The respondent was appointed by the General Manager of the appellant company as his Secretary on a salary of Rs 400 per month (recommendation of Chief Minister of Orissa alleged). On 10th April, 1962, the respondent was served with notice of termination of her service. The respondent alleged that her immediate superior misbehaved and she offered resistance and that the dismissal was *mala fide*. The Labour Court did not accept the management's contention that it has an absolute discretion to assess the work of a probationer and dispense with her service for unsatisfactory work, and held that the discharge was *mala fide* and directed payment of Rs 9,600 as compensation. On appeal to the Supreme Court.

Held there was evidence before the Labour Court to support the finding that there was no period of probation fixed and that finding is not vitiated by any error of law, it cannot be interfered with.

It is open to an Industrial Tribunal to consider whether the termination of service of an employee was not *mala fide*, in the absence of any evidence of her work being unsatisfactory the Labour Court was correct in finding that the discharge was made *mala fide*.

The amount of compensation awarded, in the circumstances of the case is excessive and has to be cut down to half (i.e.) one year's salary Rs 4,800.

Appeal by Special Leave from the Award, dated the 24th May, 1963, of the Labour Court, Orissa in Industrial Dispute No. 5 of 1962.

I. N. Shroff, Advocate, for Appellant.

The Judgment of the Court was delivered by

Ramaswami, J.—This appeal is brought, by Special Leave, against the award of the Labour Court, Orissa, dated 24th May, 1963, in Industrial Dispute No. 5 of 1962, published in the Orissa Gazette, dated 14th June, 1963.

The respondent—Miss Santi Patnaik—took her degree in Master of Arts (Political Science) in 1961. At that time, Major General Pratap Narain was the General Manager of Utkal Machinery Ltd. (hereinafter referred to as the 'Management') On 9th December, 1961, Major General Pratap Narain appointed the respondent as his Secretary on a monthly salary of Rs. 400. She was thereafter transferred to the Personnel Department of the Company as an Assistant. It appears that Shri A.L. Sarin joined as Personnel Officer on 2nd January, 1962. The respondent alleges that on 30th April, 1962, she was given notice for termination of her service. On her representation she was informed on 30th May, 1962, that the decision of the management to dispense with her service was final. The allegation of the respondent is that taking advantage of her subordinate official position Mr. Sarin misbehaved with her to which she offered resistance. The respondent asserted that the termination of her service was improper, *mala fide* and an act of victimisation. The respondent prayed that the order of termination should be set aside and she should be reinstated with full arrears of pay. The case of the respondent was taken up by the Utkal Machinery Mazdoor Sangha and on 18th December, 1962, the Government of Orissa referred the following dispute for adjudication to the Labour Court:

"Whether the termination of services of Miss S. Patnaik by the management of Messrs. Utkal Machinery Limited, Kansabahal is legal and justified? If not, what relief she is entitled to?"

The case of the management before the Labour Court was that Miss Patnaik was appointed on probation for a period of 6 months on a salary of Rs. 400 per mensem on the recommendation of the then Chief Minister of Orissa, Sri B. Patnaik, who suggested to the management that the respondent may be put "in the staff with a start of Rs. 350 or Rs. 400 with living accommodation." The management alleged that the service of the respondent was terminated during the probation period because of her unsatisfactory work and there was no question of victimisation or *mala fide* motive in the termination of the respondent's service. The management contended that it had absolute discretion to assess the work of the respondent during the period of probation and to terminate her services on the ground of unsatisfactory work. The Labour Court did not accept the contention of the management and held that there was no probationary period fixed for the respondent and the termination of her services by the management was *mala fide*, illegal and unjustified and the management should pay to the respondent a sum of Rs. 9,600 as compensation in lieu of her reinstatement.

The first question pressed on behalf of the appellant is that the Labour Court was wrong in rejecting the contention of the management that the respondent was appointed to serve for a period of 6 months on probation upto 9th June, 1962. Learned Counsel on behalf of the appellant pointed out that there was an endorsement at the bottom of the application by the respondent, dated 9th January, 1962, to the effect that she was appointed on a salary of Rs. 400 per mensem on probation for 6 months. The endorsement is in the handwriting of Major General Pratap Narain and both he and Vogel—another General Manager—have signed it. The Labour Court has examined the evidence on this point and found that no communication was sent to the respondent on the basis of the endorsement—Exhibit A-1. The management relied on a letter—Exhibit G—dated 17th

January, 1967, alleged to have been sent to the respondent. This letter states that the appointment was on probation for 6 months which may be extended at the discretion of the management and "during probationary period the services of the respondent may be terminated without any notice and without the management being bound to assign any reason therefor". The respondent, however, denied that she received any such letter from the management. The Labour Court has accepted her case and has reached the conclusion that there is no proof that the respondent was employed by the management on probation for a period of 6 months with effect from 9th December, 1961. We are unable to accept the argument on behalf of the appellant that the finding of the Labour Court on this point is not supported by proper evidence or that the finding is vitiated by any error of law.

We shall, however, assume in favour of the appellant that the respondent was appointed on 9th December 1961, on probation for a period of 6 months and it was stipulated in the contract that during the probationary period the services of the respondent could be terminated without notice and without assigning any reason. In other words, the management had the contractual right to terminate the services of the respondent without assigning any reason therefor. But if the validity of the termination is challenged in an industrial adjudication it would be competent to the Industrial Tribunal to enquire whether the order of termination has been effected in the *bona fide* exercise of its power conferred by the contract. If the discharge of the employee has been ordered by the management in *bona fide* exercise of its power, the Industrial Tribunal will not interfere with it but it is open to the Industrial Tribunal to consider whether the order of termination is *mala fide* or whether it amounts to victimisation of the employee or an unfair labour practice or is so capricious or unreasonable as would lead to the inference that it has been passed for ulterior motives and not in *bona fide* exercise of the power arising out of the contract. In such a case it is open to the Industrial Tribunal to interfere with the order of the management and to afford proper relief to the employee. This view is borne out by the decision of this Court in *Assam Oil Co., Ltd v Its workmen*.¹

The argument was stressed on behalf of the appellant that there was no dismissal of the respondent for misconduct but she was only discharged in terms of the contract and the order of the management cannot be treated as an order of dismissal of the respondent for misconduct. The Labour Court has examined the evidence on this aspect of the case and has reached the finding that the order of the management discharging the respondent, dated 30th April, 1962, was punitive in character and it should be taken as a punishment for the alleged misconduct of the respondent. The Labour Court has referred to the fact that there is no Standing Order of Utkal Machinery Ltd with regard to punishment for misconduct. In the absence of any Standing Order the unsatisfactory work of an employee may be treated as misconduct and when the respondent was discharged according to the management for unsatisfactory work it should be taken that her discharge was tantamount to punishment for an alleged misconduct. If this conclusion is correct the management was not justified in discharging the respondent from service without holding a proper enquiry. Even before the Labour Court there was no evidence adduced on behalf of the management to show that the work of the respondent was unsatisfactory. Two witnesses were examined on behalf of the management but neither uttered a word about it. Neither the Deputy General Manager nor the Joint General Manager was examined in support of the allegation. There was also no document produced on behalf of the management to illustrate the unsatisfactory work of the respondent. In her statement before the Labour Court the respondent said that she was not told in writing till 30th April, 1962, that her work was not satisfactory.

Mr. Sarin was her superior officer but he never expressed any disapprobation of her work or told her that her work was not satisfactory. The Labour Court accordingly found that there was no proof of the alleged misconduct on the part of the respondent and there was no justification for terminating her services and in the face of complete absence of evidence in regard to unsatisfactory work of the respondent the discharge of the respondent from service was *mala fide*. We hold that the view taken by the Labour Court is correct.

It was next submitted on behalf of the appellant that the amount of compensation awarded to the respondent was exorbitant. It was pointed out that the respondent had worked for an actual period of less than 5 months but she had been awarded compensation of two years' salary. We think there is some substance in this criticism. The Labour Court has relied upon the decision of this Court in *Assam Oil Co. Ltd. v. Its Workmen*,¹ but the material facts of that case were different from those in the present case. In that case the aggrieved employee, Miss. Scott was in the employment of the Assam Oil Co., Ltd. for about two years before the termination of her services. It also appears that Miss. Scott was in the service of Burmah-Shell as a lady Secretary before she entered the service of Assam Oil Co. in October, 1954. It is also important to notice that the amount of compensation in that case was fixed on a concession of the Solicitor-General who appeared on behalf of the Assam Oil Co. In the present case, the respondent did not give up any previous job in order to take service under the appellant. She had worked for a period of about 5 months with the appellant. Her appointment with the appellant also was somewhat unusual because it was made on the recommendation of Sri B. Patnaik, the then Chief Minister of Orissa. There are no special circumstances for awarding compensation equal to two years' salary. Having regard to these considerations we are of opinion that the amount of compensation awarded by the Labour Court to the respondent should be reduced and the respondent should be granted a sum of Rs. 4,800 as compensation. She should also be paid 6 per cent interest from the date of order of the Labour Court till the date of payment.

We accordingly modify the award of the Labour Court, dated 24th May 1963 and allow the appeal to this extent. There will be no order as to costs.

K.G.S.

Award reduced to half the amount.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT:—P. B. GAJENDRAGADKAR, Chief Justice, K. N. WANCHOO,
M. Hidayatullah, V. RAMASWAMI AND P. SATYANARAYANA, RAJU, JJ.

The Management of Brooke Bond India (P.), Ltd.

... Appellant*

v.

Their Workmen

.. Respondents.

Industrial Dispute—Promotion of two employees overlooking the seniority of some others—One of them the second in order—Principles governing the decision of Tribunal—Award directing the superseded persons also to be promoted—Finding of mala fides want of consideration on merits and victimization on no evidence—Not proper.

The principles governing promotions, supersession and interference by the Industrial Tribunal are as follow : Generally speaking promotion is a management function. When a Tribunal feels that some workmen have been superseded on account of *mala fides* or victimisation it may have to interfere with the promotions made by the management. Even so, it is not the function of the Tribunal to consider the merits of various employees itself and then decide whom to promote and

whom not to. The proper course for it to take is to set aside the promotions and ask the management to consider the case of the superseded employees and decide whom to promote except the persons whose promotions have been set aside.

Held on facts one of the two promoted was No. 2 in seniority and his promotion has to stand. The case of the other alone required serious consideration by the Tribunal and setting aside if *mala fides* and victimisation were found. Even then the management should be directed to promote anyone else in his place after considering their records.

There was no justification to promote five persons in addition to the two promoted and impose them on the management from the date of promotion of the two. The order of the Tribunal promoting five more is clearly wrong and has to be set aside.

Held also that there was no reliable evidence for the view taken by the Tribunal that the promotions were *mala fide* and no evidence at all that there was any victimisation.

Appeal by Special Leave from the award, dated the 14th March, 1963, of the Industrial Tribunal, Mysore, in I.T. No. 13 of 1961.

M C Setalhad, Senior Advocate, (J B Dadachanji, O C Mathur and Ravinder Narain, Advocates of M/s J B Dadachanji & Co, with him), for Appellant.

S V Gupte, Solicitor General of India (Janardan Sharma, Advocate, with him), for Respondents.

The Judgment of the Court was delivered by

Wanchoo, J—This is an appeal by Special Leave in an industrial matter. The appellant-concern promoted two employees from grade A to grade B on 1st April, 1959. These two employees were Manerikar and Dhume. As a result of this promotion Manerikar superseded one employee while Dhume superseded six employees. A dispute was raised by the respondents-workmen on account of this supersession. This was based on an earlier award with reference to this very concern by the National Tribunal which provided as follows—

All things being equal seniority shall count for promotion. If the senior person has been overlooked in the question of promotion he is at liberty to ask the concern for the reason why he has been overlooked in which case the concern shall give him the reasons provided that it does not expose the concern or the officer giving reasons to any civil or criminal proceedings.

It appears that when the supersession became known the management was asked to give the reasons and the management gave the same and said that in making promotions it took into consideration the merit, personality and suitability of the employees. This did not satisfy the employees who were superseded and a dispute was raised on their behalf by the workmen which was referred to the industrial tribunal by the Government of Mysore in these terms—

‘Whether the promotion of Sryuths P D Dhume and Y S Manerikar, superseding Sryuths G N Kamat B V Kulkarni H S Deshpande G R Balgi and D N Nask is justified? If not to what relief are the affected workmen entitled?’

It may be added that the name of Sri V R Kulkarni was added later in the list of persons superseded. The case of the workmen was that the action of the management was not *bona fide* and was taken to victimise the six employees on account of their trade union activities and that the reasons given for superseding the senior employees were vague and of a general character. The case of the appellant on the other hand was that seniority alone could not be the criterion for making promotion and that other factors like merit, personality, etc. have to be taken into consideration. The appellant asserted that all these facts had been taken into consideration when the two promotions in question were made. It was also asserted that promotions were made after considering the qualities and abilities of the employees concerned. The appellant further denied that there were any *mala fides* in the matter of these promotions or that the action was taken with a view to victimise those who were superseded.

The tribunal recognised that normally the question of promotion was a management function and had to be left mainly to the discretion of the management which had to make a choice from among the employees for promotion. But it was of the view that in a proper case the workmen had a right to demand relief when just claims of senior employees were overlooked by the management. It therefore first considered the question whether this was a case in which the workmen had the right particularly in view of the earlier decision in this very concern to demand that the two promotions made should be scrutinised by the industrial tribunal. It came to the conclusion that the action of the management was *mala fide* mainly because it took 11 weeks to reply to the query of the workmen asking for reasons for their supersession. It was of the view that the evasive replies and inordinate delay showed that the two promotions were *mala fide*. The tribunal also seems to have held that the six employees were superseded on the ground that they were more or less active members of the union and because of their trade union activities, though there is no specific finding to that effect. The tribunal further seems to have held that the delay made by the management in giving the reasons when asked to do so showed that the management had not considered the reasons for supersession prior to or at the time the promotions were made; that was why it took time to formulate reasons for supersession. Thereafter the tribunal went into the merits of the case and considered the records of the six employees which were produced before it and came to the conclusion that five of them were as good as those who had been promoted. Finally, it ordered that these five employees should be promoted from grade A to grade B with effect from the date on which the other two persons were promoted. It further ordered that these persons be given their due place with respect to their seniority. It also ordered that they were entitled to increments which they would have got if they were promoted along with the two persons namely, Manerikar and Dhume.

The appellant has attacked the correctness of this award on two main grounds. In the first place it is urged that on the face of it the award cannot be sustained for there were only two promotions by the management and the tribunal has ordered the management to promote five more persons. It is urged that the tribunal could not do this even if it found that the promotions were not justified. In any event promotion of Manerikar could not be assailed as he was No. 2 in seniority and only the promotion of Dhume could be assailed. In any case it is urged that there was no occasion to promote seven persons from the date from which these two promotions were made, for on that date there were only two promotions to be made and what in effect the tribunal had done is to make seven promotions on that date. Secondly, it is urged that the tribunal's finding that there were *mala fides* and victimisation is based on no evidence. Further it is urged that even if the tribunal found that there was case for interference with the promotions made, the tribunal should have set aside the promotion of Dhume for Manerikar in any case was entitled to promotion being No. 2 in the seniority list and should have directed the appellant to promote another person in place of Dhume after considering all relevant factors.

We are of opinion that both the contentions raised on behalf of the appellant are correct. Generally speaking promotion is a management function; but it may be recognised that there may be occasions when a tribunal may have to interfere with promotions made by the management where it is felt that persons superseded have been so superseded on account of *mala fides* or victimisation. Even so after a finding of *mala fides* or victimisation, it is not the function of a tribunal to consider the merits of various employees itself and then decide whom to promote or whom not to promote. If any industrial tribunal finds that promotions have been made which are unjustified on the ground of *mala fides* or of victimisation, the proper course for it to take is to set aside the promotions and

ask the management to consider the cases of superseded employees and decide for itself whom to promote, except of course the person whose promotion has been set aside by the tribunal.

Bearing these principles in mind we now turn to the contentions raised before us. In the first place only two promotions were made on 1st April, 1959. Of these Manerikar was No. 2 and he in any case would have been promoted even if promotions went only by seniority. So it was only the case of Dhume which required serious consideration by the tribunal. Assuming that the tribunal came to the conclusion that Dhume's promotion suffered from the infirmity of victimisation or *mala fides* that promotion alone should have been set aside and the management directed to promote some-one else in his place after considering the records of all senior employees worth consideration. But there was in our opinion no justification for the tribunal to promote five persons in addition to the two promoted by the management and to make these promotions retrospective from 1st April, 1959. It is obvious that only two promotions were made on 1st April, 1959, and the tribunal could not impose seven promotions on the management as from that date. The order therefore passed by the tribunal promoting five other employees is clearly wrong. It is true that one term of reference was with respect to the relief to be given to the workmen who were superseded. That however did not mean that the tribunal should promote five more persons from the same date as the two promoted by the management. The order of the tribunal therefore promoting these five persons in addition to the two already promoted by the management must be set aside on this ground alone.

Turning now to the question of *mala fides*, the only ground which the tribunal has given for coming to that conclusion is that the management made a delay of eleven weeks in giving its reply to the workmen's query for reasons for their supersession. We are of opinion that this is hardly a reason for coming to the conclusion that the promotions were *mala fide*. Another reason given by the tribunal is that the replies were evasive and vague. Now the reply was that the promotions were made after considering the merits, personality and suitability of the employees concerned. We cannot agree that these reasons amount to evasive replies for after all promotion will depend upon merit, suitability and personality of the persons concerned. Nor do we think that initiative and efficiency which were later emphasised by the management before the tribunal as among the grounds for promotion can be said to be an after-thought, for initiative and efficiency must be deemed to be included in the word "merit" which appeared in the replies given by the management. There was thus in our opinion no basis whatsoever for the Tribunal to come to the conclusion that the promotions were *mala fide*.

Turning now to the question of victimisation, we have already said that there is no clear finding of the Tribunal that there was victimisation. But it appears to be suggested in para. 53 of the award that the Tribunal felt that there was victimisation. Of the six superseded employees we find that only one was an official of the union while the other five were merely members just like Manerikar. Dhume it appears was not a member of the union. But there was no evidence to show that there were any strained relations between the management and these six employees on account of their trade union activities. We have already said that five of them were ordinary members of the union like Manerikar and only one Balgi was an official of the union. But there is nothing to show that because of that there was any bad blood between Balgi and the management. We are therefore of the opinion that there is no evidence worth the name on which the Tribunal could have come to the conclusion that these two promotions were as a result of victimisation of those persons who were superseded.

The management had stated in its reply that it had considered all the relevant factors and had also considered the cases of all senior employees due for promotion before promoting these two persons. We cannot see how the Tribunal could come to the conclusion merely from the fact that there was some delay in giving the reply to the query as to the reasons that the management had not considered the relative merits of all senior employees before making the promotion. We have no doubt that the finding of the Tribunal that the relative merits were not considered or that there were *mala fides* or that there was victimisation are based on no evidence and must therefore be set aside. Once that conclusion is reached there was in our opinion no reason for the Tribunal to interfere with the promotions made by the management.

We therefore allow the appeal, set aside the award of the Tribunal and hold that the promotions of Y.S. Manerikar and P.D. Dhume were justified. No relief is therefore due to the other six employees. In the circumstances we pass no order as to costs.

K.G.S.

*Appeal allowed; award set aside**

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—P. B. GAJENDRAGADKAR, *Chief Justice*, K. N. WANCHOO, M. HIDAYATULLAH AND V. RAMASWAMI, JJ.

The Bombay Labour Union and another

— *Appellants**

v.

M/s. International Franchises (P.), Ltd. and another

... *Respondents*

The Committee for Defence of Working Women's Rights and another

... *Interveners.*

Industrial Dispute—Conditions of service—Power of Industrial Tribunal to vary—Unmarried women employed in a particular department of employer—Rule requiring their resignation on marriage—To be abrogated as unjustified.

Indian Administrative Service (Recruitment) Rules, 1954, Rule 5 (3)—Distinction in the scope of the rule applicable to married women.

The rule in the conditions of service, requiring that the unmarried women employed in a particular department of the employer, to resign on their getting married cannot be justified on any ground and has to be abrogated.

It is too late in the day now to stress the absolute freedom of an employer to impose any condition which he likes on labour. It is always open to industrial adjudication to consider the conditions of employment of labour and to vary them if it is found necessary, unless the employer can justify an extraordinary condition like the one in the instant case, by reasons which carry conviction.

In regard to the rule relating to married women, in the Indian Administrative Service (Recruitment) Rules, 1954, it is only when the Central Government considers that marriage has impaired the efficiency of the woman concerned that the Central Government may call upon her to resign.

Appeal by Special Leave from the Award, dated the 31st May, 1963, of the Industrial Tribunal, Maharashtra in Reference (IT) No. 59 of 1963.

S.B. Naik, K.R. Chaudhuri, Advocates, for Appellants.

S.V. Gupte, Solicitor-General of India (G. B. Pai, J. B. Dadachanji, O.C. Mathur and Ravinder Narain, Advocates of M/s. J.B. Dadachanji & Co. with him) for Respondent No. 1.

A S R Chari, Senior Advocate (*K Rajendro Chaudhury*, *M S K Aiyangar* and *M R K Pillai*, Advocates with him), for Respondent No 2.

A S R Chari Senior Advocate (*M K Ramamurthi* Advocates of *M/s M K Ramamurthi & Co* with him), for Interveners

The Judgment of the Court was delivered by

Wanchoo, J—The only question raised in this appeal by Special Leave is the propriety of a service condition in the respondent concern by which unmarried women in a particular department have to resign on their getting married. A dispute was raised about this condition by the appellant-union on behalf of the workmen and was referred to the Industrial Tribunal, Maharashtra in the following terms—

The existing bar on ladies that on the r getting married they have to leave the service of the company should be removed

The respondent is a pharmaceutical concern. It appears that there is a rule in force in the respondent concern according to which if a lady workmen gets married her services are treated as automatically terminated. It appears that such a rule is in force in other pharmaceutical concerns in that region and the matter came up on two occasions before Industrial Tribunals for adjudication with reference to other pharmaceutical concerns, and on both occasions the challenge by the workmen to such a rule failed. On the first occasion the dispute was between *The Boots Pure Drug Co (India), Limited v Their Workmen*,¹ and a similar rule was upheld in 1956. On the second occasion the dispute was between *Sandoz (India) Limited v Workmen employed under it*.² There was agitation in the respondent concern in connection with this rule and the present reference was eventually made in February, 1963. The Tribunal followed its earlier decision in *Sandoz Limited's case*² and rejected the contention that the rule be abrogated. The appellant obtained Special Leave to appeal from this Court, and that is how the matter has come up before us.

Ordinarily we see no reason for such a rule requiring unmarried women to give up service on marriage, particularly when it is not disputed that no such rule exists in other industries. It is also not in dispute that no such rule exists in other departments of the respondent-concern itself and it is only in one department that the rule is in force. It can only be upheld if the respondent shows that there are good and convincing reasons why in this particular department of the pharmaceutical industry it is necessary to have such a rule. The only reason given for enforcement of this rule in this department of the respondent concern is that the workmen have to work in teams in this department and that requires that they should be regular and that this cannot be expected from married women for obvious reasons and that there is greater absenteeism among married women than among unmarried women or widows against whom there is no bar of this kind.

We are not impressed by these reasons for retaining a rule of this kind. The work in this department is not arduous for the department is concerned with packing, labelling, putting in phials and other work of this kind which has to be done after the pharmaceutical product has been manufactured. Nor do we think that because the work has to be done as a team it cannot be done by married women. We also feel that there is nothing to show that married women would necessarily be more likely to be absent than unmarried women or widows. If it is the presence of children which may be said to account for greater absenteeism among married women, that would be so more or less in the case of widows with children also. The fact that the work has got to be done as a team and presence of all those workmen is necessary, is in our opinion no disqualification so far as married women are concerned. It cannot be disputed that even

1 B G G Part I dated 26th January 1956

2 (1962) Industrial Cases Reporter 22

unmarried women or widows are entitled to such leave as the respondent's rules provide and they would be availing themselves of these leave facilities. The only difference in the matter of absenteeism that we can see between married women on the one hand and unmarried women and widows on the other is in the matter of maternity leave which is an extra facility available to married women. To this extent only, married women are more likely to be absent than unmarried women and widows. But such absence can in our opinion be easily provided for by having a few extra women as leave reserve and can thus hardly be a ground for such a drastic rule as the present which requires an unmarried woman to resign as soon as she marries. We have been unable to understand how it can be said that it is necessary in the interest of efficient operation and in the company's economic interest not to employ married women. So far as efficient operation is concerned, it can hardly be said that married women would be less efficient than unmarried women or widows so far as pure efficiency in work is concerned, apart of course from the question of maternity leave. As to the economic interest of the concern, we fail to see what difference the employment of married women will make in that connection for the emoluments whether of an unmarried woman or of a married woman are the same. The only difference between the two as we have already said is the burden on account of maternity leave. But as to that the respondent contends that the reason for having this rule is not the respondent's desire to avoid the small burden to be placed on it on account of maternity leave. If that is so, we fail to see any justification for a rule of this kind which requires an unmarried woman to give up service immediately she marries. We are therefore of opinion that there is no good and convincing reason why such a rule should continue in one department of the pharmaceutical industry. The fact that such a rule exists in other such concerns is no justification, if the rule cannot be justified on its own merits.

Then it is urged that the employer was free to impose any condition in the matter of employment when he employs a new workman and that industrial adjudication should not interfere with this right of the employer. All that need be said in this connection is that it is too late in the day now to stress the absolute freedom of an employer to impose any condition which he likes on labour. It is always open to industrial adjudication to consider the conditions of employment of labour and to vary them if it is found necessary, unless the employer can justify an extraordinary condition like this by reasons which carry conviction. In the present case the reasons which the respondent has advanced and which were the basis of the two decisions referred to earlier do not commend themselves to us as sufficient for such a rule. We are therefore of opinion that such a rule should be abrogated in the interest of social justice.

Lastly it is urged that a similar rule exists in certain Government Services and in this connection our attention is drawn in particular to rule 5 (3) of the 1954 Indian Administrative Service (Recruitment) Rules. That rule reads as follows:—

"No married woman shall be entitled as of right to be appointed to the Service, and where a woman appointed to the Service subsequently marries, the Central Government may, if the maintenance of the efficiency of the Service so requires, call upon her to resign."

It will be seen that this rule for the Indian Administrative Service is not unqualified like the rule in force in the respondent's concern. It only lays down that where an unmarried woman marries subsequently, the Central Government may, if the maintenance of the efficiency of the Service so requires call upon her to resign. Therefore this rule does not compel unmarried women to resign on marriage as a matter of course as is the case in the respondent-concern. It is only when the Central Government considers that marriage has impaired the efficiency of the woman concerned that the Central Government may call upon her to resign. The rule which is in force in the respondent concern however assumes that merely by marriage the efficiency of the woman-employee

is impaired and such an assumption in our opinion is not justified. At any rate this rule for the Indian Administrative Service which has been brought to our notice only for purposes of comparison does not justify the drastic rule that we have in the present case where an unmarried woman is compelled to resign immediately she marries without regard to her continued efficiency.

On a careful consideration of the reasons advanced on behalf of the respondent in support of the existing rule we are of opinion that the reasons do not justify such a drastic rule. We therefore allow the appeal and direct that the rule in question in the form in which it exists at present be abrogated. The abrogation shall take effect from the date of this judgment. The appellants will get their costs from the respondent company.

V S

Appeal allowed

THE SUPREME COURT OF INDIA

(Civil Appellate Jurisdiction)

PRESENT —P B GAJENDRAGADKAR, Chief Justice, K N WANCHOO,
M. HIDAYATULLAH AND V RAMASWAMI, JJ

The Salem Erode Electricity Distribution Co., (P), Ltd

*Appellant**

Their Employees' Union

Respondents

Industrial Employment (Standing Orders) Act (XX of 1946) as amended by Act XXXVI of 1956—Object of—More than one set of Standing Orders—If can be certified under (though fair and reasonable)

On the question, whether under the scheme of the Act it is permissible to the employer to require the appropriate authorities under the Act to certify two sets of Standing Orders in regard to any of the matters covered by the Schedule (leave and holidays in the instant case)

Held, though the new Standing Orders proposed in respect of new entrants may be reasonable, two sets of Standing Orders governing the employees in the same industrial establishment cannot be made under the Act.

The object of the Act is to certify Standing Orders in respect of the matters covered by the Schedule thereto and having regard to these matters Standing Orders so certified would be uniform and would apply to all workmen alike, who are employed in any industrial establishment so as to avoid any industrial unrest and disharmony because of discrimination.

Quaere Whether any dispute in regard to matters covered by certified Standing Orders can be referred to the Industrial Tribunal for adjudication notwithstanding the self-contained provisions of Act XX of 1946?

Appeal by Special Leave from the Order, dated the 9th April, 1963, of the Labour Court, Coimbatore, in CSO Appeal No. 1 of 1962.

M.C. Setalvad, Senior Advocate (Naumt Lal, Advocate with him), for Appellant

M.K. Ramamurthi, R.K. Garg, D.P. Singh and S.C. Agarwala, Advocates for M/s M.K. Ramamurthi & Co., for Respondents

The Judgment of the Court was delivered by

Gajendragadkar, C.J.—The appellant, Salem Erode Electricity Distribution Co. Ltd., is a licensee under the Indian Electricity Act, 1910, and its business consists in buying electrical energy in bulk from the State Electricity Board of

Madras and selling it to consumers in Salem and Erode and certain rural districts in the State of Madras. For the purpose of carrying on this business, the appellant has an industrial establishment at Salem.

In or about 1940, when the number of the appellant's consumers was about 3,000, and that of its workmen about 45, the appellant framed certain terms and conditions of its workmen's employment. Amongst these were included terms about leave and holidays. Later, when the Industrial Employment (Standing Orders) Act (XX of 1946) (hereinafter called 'the Act') came into force, the provisions as to leave and holidays which had been introduced by the appellant in the terms and conditions of the employment of its workmen, were embodied in the appellant's Standing Orders which were certified under the relevant provisions of the Act in or about 1947. The said terms read thus:—

"Standing Order 5 (b). The number of holidays to be granted to the workmen and the days which shall be observed as holidays by the Establishment shall be regulated in accordance with the Factories Act, 1948 or other relevant law for the time being in force and the custom or usage of the Establishment, viz., holidays under the Negotiable Instruments Act, 1881 and festival holidays peculiar to this locality which are being given.

Standing Order 10 (a).—Leave will be given in accordance with the law and existing practice provided the leave facilities now available to the workers are not curtailed in any manner."

The proceedings which have given rise to the present appeal by Special Leave between the appellant and the respondents, its employees, began with the application made by the appellant on the 6th October, 1960, before the Certifying Officer, Madras, for the amendment of the Certified Standing Orders to which we have just referred. By its application, the management of the appellant wanted the said Orders to read thus:—

"Standing Order 5 (b).—For all workmen who have joined service prior to..... holidays under the Negotiable Instruments Act, 1881 and festival holiday of one day per year which day may be chosen by the workmen shall be given. For all workmen who have joined on and after.....holidays under the Madras Industrial Establishments (National and Festival holidays) Act, 1958, shall be given."

Standing Order 10 (a).—Leave will be given to all employees who are appointed on and afterin accordance with the provisions of the Madras Shops and Establishment Act, 1947, or any statutory modification thereof (irrespective of whether this Act applies or not to any category of employee or employees). Provided, however, that for all employees who have been confirmed prior to the above said date, viz.the leave facilities now available are not curtailed in any manner".

It is relevant to mention the background of the present application. The appellant believed that the urgent need for increased production and for increased supply of electrical energy could be met if the existing rules embodied in Standing Orders 5(b) and 10 (a) were suitably modified; and so, the appellant wanted to make the change in the said two Standing Orders on the lines indicated by it in its application to the Certifying Officer. It appears that these Rules were introduced by the appellant on the 1st October, 1960, and were embodied in the contracts of service of new entrants who joined the appellant's employment as from that date. In fact, they were agreed to by such new entrants. In order to regularise the steps taken by the appellant by revising the relevant Rules in respect of the new entrants to its employment, the appellant made the present application.

The change proposed to be made by the appellant in the two Standing Orders in question was resisted by the respondents' Union. It was urged by the respondents that the proposed change was unfair and unreasonable, and it was also argued that it would introduce discrimination between one set of employees and another working under the same employer. and that would naturally cause industrial unrest and disharmony. The Certifying Officer upheld the pleas raised by the respondents and he accordingly directed that the proposed amendments should be negated.

The appellant then preferred an appeal against the said order before the appellate authority. Both the parties urged similar contentions before the appellate authority and the said authority agreed with the view taken by the Certifying Officer and dismissed the appeal preferred by the appellant. It is against this order that the appellant has come to this Court by Special Leave.

On behalf of the appellant, Mr Setalvad has urged that the change which the appellant wants to make in the two relevant orders is, on the merits, fair and reasonable, and he adds that the appellant wanted to prove its *bona fides* by making the changed Standing Orders applicable to the future entrants and not extending them to its employees who were already in its employment and who are governed by the existing Standing Orders. According to Mr Setalvad, the Certifying Officer and the appellate authority have erred in law in not certifying the changed Standing Orders as proposed by the appellant.

In dealing with this point, it is necessary to examine the broad features of the Act and consider its main purpose and object. The Act was passed in 1946 and its main object was to require the employers in industrial establishments to which the Act applied, to define formally the terms and conditions of employment in their respective establishments. In imposing this obligation on the employers, the Act intended that the terms and conditions of industrial employment should be well defined and should be known to the employees before they accepted the employment. As we will presently point out, one of the objects of the Act was to introduce uniformity of terms and conditions of employment in respect of workmen belonging to the same category and discharging the same or similar work under an industrial establishment. Before the Act was passed, employees in many industrial establishments were governed by oral terms and conditions of service which were not uniform and which had been entered into on an *ad hoc* basis. The Act now requires that terms and conditions of employment in relation to matters specified in the Schedule must be included in the Standing Orders and they must be certified. It would at once be clear that by the operation of the Act, all industrial establishments will have to frame terms and conditions of service in regard to all the matters specified in the Schedule, and that naturally would introduce an element of uniformity inasmuch as industrial employment in all establishments to which the Act applied would, after the Act was passed, be governed by terms and conditions of service in respect of matters which are common to all of them. That, in brief, is the object which the Act intends to achieve.

Let us now see the scheme of the Act. "Standing Orders" are defined by section 2 (g) as meaning rules relating to matters set out in the Schedule, these matters are 11 in number, and the last one of them refers to any other matter which may be prescribed. "Prescribed" according to section 2 (f) means prescribed by Rules made by the appropriate Government under this Act, and so, Standing Orders mean rules made in relation to the matters enumerated in clauses (1) to (10) in the Schedule as well as any other matter which may in future be added by means of Rules to be made by the appropriate Government. This gives a general idea about the matters which are intended to be covered by the Standing Orders.

Section 3 of the Act requires the submission of Draft Standing Orders by the employer within six months from the date on which the Act becomes applicable to an industrial establishment. A statutory obligation has been imposed upon the employer to take necessary action as required by section 3 (1). Section 4 requires that the Standing Orders must deal with every matter set out in the Schedule which is applicable to the industrial establishment, and must be in conformity with the provisions of the Act. Section 5 deals with the proceedings for certification of the Standing Orders by the Certifying Officer. Section 6 provides for appeals against the orders passed by the Certifying Officer. Section 7 prescribes the date on which the Certified Standing Orders will come into operation. Section 10 (2)

provides for the modification of the Standing Orders. Section 13-A provides for the machinery to deal with questions in relation to the application or interpretation of Standing Orders certified under the Act; and section 15 confers powers on the appropriate Government to make Rules to carry out the purposes of the Act.

When the Act was originally passed, the powers of the Certifying Officer as well as those of the appellate authority were limited to consider the question as to whether the Standing Orders submitted for certification were in accordance with the Act or not. By an amendment made in 1956, jurisdiction has been conferred on the Certifying Officer as well as the appellate authority to adjudicate upon the fairness or reasonableness of the provisions of the Standing Orders submitted for certification. That means the jurisdiction of the appropriate authorities functioning under the Act has now been widened and they are required to consider whether the Standing Orders submitted to them for their approval are fair or reasonable. Parties can make their contentions in respect of the fairness or reasonableness of the proposed Standing Orders, and the appropriate authorities will adjudicate upon the said contentions. That is one change made in 1956.

The other change made in the original provisions of the Act, which is relevant for our purpose is in regard to the provisions contained in section 10 (2). Under the original provision of section 10 (2), it was only the employer who was authorised to make an application to the Certifying Officer to have the Standing Orders modified. By the amendment made in 1956, even workmen are now entitled to apply for the modification of the Standing Orders. The result of this amendment is that if workmen are dissatisfied with the operation of the existing Standing Orders, they can move for their modification by applying to the Certifying Officer in that behalf. Before this amendment was made, the only course open to the workmen to adopt for securing any modification in the existing Standing Orders was to raise an industrial dispute and move the appropriate Government to refer the said dispute to the adjudication of the appropriate Industrial Tribunal. Both these amendments have been introduced by Act XXXVI of 1956.

Now, the question which we have to decide is: is it permissible for an industrial establishment to have two sets of Standing Orders to govern the relevant terms and conditions of its employees? Mr. Setalvad argues that if the change is intended to be made in the existing Standing Orders, it should be permissible and indeed legitimate for an employer to seek for the change on the ground that the said change would be reasonable and fair, provided the existing rights of employees already employed are not affected by such change. *Prima facie*, this argument appears to be attractive; but if we examine the scheme of the relevant provisions of the Act in the light of the matters specified in the Schedule in respect of which Standing Orders are required to be made, it appears that two sets of Standing Orders cannot be made under the Act.

Let us first examine the matters specified in the Schedule. They are specified under clauses (1) to (11). The first is in regard to classification of workmen. The second is in relation to the manner of intimating to workmen periods and hours of work, holidays, pay-days and wage rates. The third has reference to shift working; the fourth to attendance and late coming. Clause (5) relates to conditions of, procedure in applying for, and the authority which may grant, leave and holidays. Clause (6) deals with the requirement to enter premises by certain gates, and liability to search. Clause (7) is concerned with the closing and reopening of sections of the industrial establishment, and temporary stoppages of work and the rights and liabilities of the employer and workmen arising therefrom. Clause (8) deals with the termination of employment, and the notice thereof to be given by employer and workmen. Clause (9) covers the subject of suspension or dismissal for misconduct, and acts or omissions which constitute misconduct. Clause (10) relates to means of redress for workmen against unfair treatment or

wrongful exactions by the employer or his agents or servants. Clause (11) is the residuary clause which refers to any other matter which may be prescribed

One has merely to examine these clauses one by one to be satisfied that there is no scope for having two separate Standing Orders in respect of any one of them. Take the case of classification of workmen. It is inconceivable that there can be two separate Standing Orders in respect of this matter. What we have said about classification is equally true about each one of the other said clauses and so, the conclusion appears to be irresistible that the object of the Act is to certify Standing Orders in respect of the matters covered by the Schedule, and having regard to these matters, Standing Orders so certified would be uniform and would apply to all workmen alike who are employed in any industrial establishment.

Prior to the enactment of the Act industrial establishments used to employ workmen on different terms and conditions of service and they used to enter into separate agreements with employees on an *ad hoc* basis. It was precisely with the object of avoiding this anomalous position that the Act has been passed and an obligation has been imposed upon the industrial establishments to have their Standing Orders certified by the appropriate authorities. Therefore, we do not think Mr Setalvad is right in contending that it is open to an industrial establishment to have two sets of Standing Orders certified in relation to leave and holidays provided that the modified Standing Orders apply to future entrants and the existing Standing Orders apply to entrants who are already in the employment of the establishment.

On principle it seems expedient and desirable that matters specified in the Schedule to the Act should be covered by uniform Standing Orders applicable to all workmen employed in an industrial establishment. It is not difficult to imagine how the application of two sets of Standing Orders in respect of the said matters is bound to lead to confusion in the working of the establishment and cause dissatisfaction amongst the employees. If Mr Setalvad is right in contending that the Standing Orders in relation to these matters can be changed from time to time, it may lead to the anomalous result that in course of 10 or 15 years there may come into existence 3 or 4 different sets of Standing Orders applicable to the employees in the same industrial establishment, the application of the Standing Orders depending upon the date of employment of the respective employees. That, we think is not intended by the provisions of the Act.

Once the Standing Orders are made it is not unlikely that disputes may arise between the employer and the employees in regard to their application or their interpretation, and the Act has specifically made a provision for dealing with problems of this kind. As we have already indicated, section 13 A provides that if any question arises as to the application or interpretation of a Standing Order certified under the Act, an employer or a workman may refer the question to any one of the Labour Courts indicated by the section and the said Labour Court shall after giving the parties an opportunity of being heard, decide the question and such decision shall be final and binding on the parties.

The result, therefore, appears to be that in regard to the certification of the Standing Orders, the Act provides for a self-contained Code. The Certifying Officer is given the power to consider questions of fairness and reasonableness as well as the other questions indicated by section 4 (a) and (b). An appeal is provided against the decision of the Certifying Officer and in case a dispute arises as to the interpretation or the application of the Standing Order, a remedy is provided by section 13 A. Besides as we have already pointed out, a right is given both to the employer and the workmen to move the appropriate authorities for modification of the existing Standing Orders. That is why we do not think that

Mr. Setalvad is right in contending that the Certifying Officer as well as the appellate authority erred in law in refusing to certify the modified Standing Orders submitted by the appellant for certification.

It may be that even in regard to matters covered by Certified Standing Orders, industrial disputes may arise between the employer and his employees, and a question may then fall to be considered whether such disputes can be referred to the Industrial Tribunal for its adjudication under section 10 (1) of the Industrial Disputes Act. In other words, where an industrial dispute arises in respect of such matters, it may become necessary to consider whether, notwithstanding the self-contained provisions of the Act, it would not still be open to the appropriate Government to refer such a dispute for adjudication. We wish to make it clear that our decision in the present appeal has no relation to that question. In the present appeal, the only point which we are deciding is whether under the scheme of the Act, it is permissible to the employer to require the appropriate authorities under the Act to certify two different sets of Standing Orders in regard to any of the matters covered by the Schedule.

It now remains to consider the three decisions to which Mr. Setalvad has invited our attention. In *Rai Bahadur Diwan Badri Das v. The Industrial Tribunal, Punjab*¹, this Court had to consider the question as to whether the Tribunal against whose award an appeal had been brought to this Court by the appellant Rai Bahadur Diwan Badri Das was in error in refusing to allow the appellant's prayer that he should be permitted to introduce a new rule in respect of leave with wages applicable to the entrants in his employment after the 1st July, 1956. It appears that on the said date, the appellant made a rule that every workman employed on or before that date would be entitled to 30 days leave with wages after working for 11 months and workmen employed after that date would be entitled to earned leave in accordance with the provisions of section 79 of the Indian Factories Act. This rule led to an industrial dispute which was referred to the Industrial Tribunal, and the Tribunal held that all the workmen were entitled to 30 days earned leave as under the existing rule and that the rule made by the appellant on the 1st July, 1956 cannot be enforced. It was this award which was challenged by the appellant before this Court, and the challenge was based on the broad and general ground that the employer had full freedom of contract to make a rule for the employment of his employees and that the Industrial Tribunal is not entitled to interfere with his freedom of contract. It appears that the change which the employer sought to make by the new rule did not involve any appreciable financial burden, and it was not the case of the appellant that the existing rule caused any hardship to him. The appellant, however, wanted to urge before this Court the theoretical ground that in a matter of employment, an industrial employer is entitled to make his own conditions with his employees and that industrial adjudication should not interfere with his freedom of contract in that behalf. Indeed, as the majority judgment shows, the appellant was a good employer and was treating his employees in a very liberal manner. He, however, brought the dispute before this Court in order to assert the general principle which was raised for the decision of this Court. That is the background of the majority decision in *Rai Bahadur Diwan Badri Das's case*.¹

Dealing with the broad point raised by the learned Solicitor-General on behalf of the appellant in that case, this Court held that several decisions pronounced by industrial adjudication had now established the principle that the doctrine of absolute freedom of contract had to yield to the higher claims for social justice. Even so, this Court took the precaution of making it clear that the general question about the employer's right to manage his own affairs in the best way he chooses, cannot be answered in the abstract without reference to the facts and circumstances in regard to which the question is raised, and it was pointed out that in

1. (1963) 2 S C J. 193; (1963) 3 S C R. 930: A I R. 1963 S C. 630

industrial matters of this kind there are no absolutes and no formula can be evolved which would invariably give an answer to different problems which may be posed in different cases on different facts

Having thus dealt with the general point raised by the learned Solicitor General in *Ra Bahadur Diwan Badri Das's case*¹ the majority decision considered the facts in that particular case and held that the Tribunal was not shown to have been in error when it held that in the matter of earned leave there should be uniformity of conditions of service governing all the employees in the service of the appellant. It was in that connection that reference was made to the fact that in regard to all the other terms and conditions of service there was uniformity in the appellant's establishment itself and so, it was thought that the Tribunal might have been justified in discouraging a departure from the said uniformity in respect of one item viz, earned leave. It would thus be clear that this decision does not lay down any general principle at all. In fact, this decision emphatically brings out the point that in dealing with industrial disputes industrial adjudication should always resist the temptation of laying down any broad general or unqualified propositions. Therefore we do not think that the decision of this Court in the case of *R B Diwan Badri Das*¹ is of much assistance. In that case the Court was dealing with an award pronounced by an Industrial Tribunal in an industrial dispute and the narrow question which the Court decided was that the Industrial Tribunal was not in error in not upholding the rule made by the employer on the 1st July, 1956. In the present case, we are dealing with proceedings arising under the Act and that means that considerations which govern the present proceedings are not necessarily the same as those which would govern the decision of an industrial dispute brought before the Industrial Tribunal for its adjudication under the Industrial Disputes Act.

The next decision to which Mr Setalvad has referred was pronounced by this Court in the case of *Associated Cement Staff Union and another v Associated Cement Company and others*². During the course of the hearing of this appeal, some arguments were urged before us on the question about the relation between terms and conditions of service governing working hours, leave and the like and the wages paid to the employees. Mr Ramamurti who appeared for the respondents conceded that the terms and conditions in regard to leave or working hours can be changed but he contended that the increase in the working hours or the reduction of earned leave should not be permitted to be introduced without taking into account the question about the consequent increase in the wage structure itself, and it was with a view to combat this contention that Mr Setalvad referred us to the decision in the *Associated Cement Co.*² In that case, the question of holidays, working hours and wages were all referred to the Industrial Tribunal for its decision. The matter which arose for the decision of this Court in the appeals which were brought to this Court in that case was *inter alia* in regard to holidays. The Tribunal had allowed 21 holidays whereas this Court reduced the number to 16. Dealing with the question about the normal working hours this Court observed that

Once a conclusion about the normal working hours is reached after considering the optimum working hours on a consideration of all the relevant factors industrial adjudication cannot hesitate to give effect to its conclusion merely because the workmen would have been entitled to more wages at overtime rates if the hours of work had been fixed at less.

Mr Setalvad relies upon this observation. But we think it would be unreasonable to read this observation in isolation because in the very next sentence this Court has added that it is true that in fixing the proper wage scale, the question of workload and the matter of working hours cannot be left wholly out of considera-

¹ (1963) 2 S.C.J. 193 (1963) 3 S.C.R. 930
A.I.R. 1963 S.C. 630

² (1964) 1 L.L.J. 12 A.I.R. 1964 S.C. 914

tion, though it further observed that many other factors including the need of the workmen, the financial resources of the employer, the rates of wages prevailing in other industries in the region, have all to be considered in deciding the wage-scale. It appears that in that case, the Tribunal itself had held that 21 holidays erred on the side of excessive liberality, and yet it did not reduce that number. That is why this Court reduced the number of holidays from 21 to 16. This decision, in our opinion, does show that where industrial adjudication has to deal with an industrial dispute in relation to wage structure, working hours, and holidays, it must consider the problem comprehensively and in prescribing the working hours, and making provision for holidays and leave with or without pay amongst other relevant factors, the wages paid to the employees have no doubt to be taken into account. But these, considerations do not arise in the present proceedings, because what the appropriate authorities under the Act had to consider was whether two sets of Standing Orders should be permitted under the same establishment or not.

The last case to which reference must be made is *Guest, Keen, Williams Private Ltd. v. P. J. Sterling and others*.¹ In that case, the Standing Order had been certified under the Act prior to its amendment. The relevant Standing Order had relation to the age of retirement of the employees under the establishment in question. When the Standing Order was certified, its fairness and reasonableness could not have been examined by the Certifying Authority. After it was certified, the employer sought to give effect to the age of retirement in regard to employees who were already in its employment; and that gave rise to an industrial dispute. The employees who were already in the employment of the employer, contended that prior to the certification of the Standing Order, there was no age of retirement in the concern and they urged that the Certified Standing Order could not affect their right to continue in the employment so long as they were fit to discharge their duties. It was in the context of this dispute that the question arose as to whether the Certified Standing Order applied to the previously existing employees. The Labour Appellate Tribunal against whose decision the appeal was brought to this Court by the appellant *Guest, Keen, Williams Private Ltd.*, had held that the Certified Standing Order could not apply to the employees who were already in the employment of the appellant. This Court affirmed the view expressed by the Labour Appellate Tribunal that the Certified Standing Order could not affect the rights of the previous employees; nevertheless, it was held that the question of prescribing an age of retirement for them could be considered in the proceedings before the Court and under the special circumstances to which reference has been made in the judgment, it was thought that the age of superannuation for prior employees could be reasonably and fairly fixed at 60 years. This decision again is not of any assistance, because the matter came to this Court from an industrial dispute which was the subject-matter of industrial adjudication before the Industrial Tribunal and the Labour Appellate Tribunal, and all that this Court did was to fix an age of superannuation for workmen who had been employed prior to the date of the certification of the relevant Standing Order, at 60, and that course was adopted under the special and unusual circumstances expressly stated in the course of the judgment. As we have already pointed out, the question as to whether two sets of Standing Orders can be certified under the provisions of the Act, did not fall to be considered in that case. Therefore, we are satisfied that the Certifying Officer as well as the appellate authority committed no error of law in refusing to certify the modified Standing Orders submitted by the appellant in the present proceedings.

The result is, the appeal fails and is dismissed with costs.

Appeal dismissed.

K.G.S.

1. (1960) 1 S.C.R. 348; (1960) S.C.J. 281; A.I.R. 1959 S.C. 1279.

THE SUPREME COURT OF INDIA

(Civil Appellate Jurisdiction)

PRESENT — P B GAJENDRAGADKAR, *Chief Justice*, K N WANCHOO,
V RAMASWAMI AND P SATYANARAYANA RAJU, JJ

The Management of the Syndicate Bank, Ltd

. Appellant*

v

The Workmen

Respondents

Industrial Dispute—Employer, a bank—Order of transfer of an employee—Act in the sole discretion of the Bank—No interference by Industrial Tribunal unless act done mala fide—Finding of mala fide—To be based on sufficient and proper evidence

The Banks are entitled to decide on a consideration of the necessities of banking business whether the transfer of an employee should be made to a particular branch. The management of the Bank is in the best position to judge how to distribute its employees between the different branches. The Industrial Tribunals should be very careful before they interfere with the orders made by the Banks in the discharge of their managerial functions.

But if an order of transfer is made *mala fide* or for some ulterior purpose like punishing an employee for his trade union activities the Industrial Tribunals should interfere and set aside such an order of transfer because the *mala fide* exercise of power is not considered to be the legal exercise of the power given by law.

But the finding of *mala fide* should be reached only if there is sufficient and proper evidence in support of such a finding. Such a finding should not be reached capriciously or on flimsy grounds.

The finding of *mala fide* reached by the Tribunal cannot be sustained on the evidence in the present case.

Appeal by Special Leave from the Award dated the 18th January, 1964 of the Industrial Tribunal, Andhra Pradesh, in Industrial Dispute No. 33 of 1963.

M C Setalvad, Senior Advocate (R V Pillai, Advocate with him), for Appellant.

M K Ramamurthi, R K Garg, S C Agarwal and D P Singh, Advocates of M/s M K Ramamurthi & Co, for Respondents.

The Judgment of the Court was delivered by

Ramaswami, J.—This appeal is brought, by Special Leave, from the award of the Industrial Tribunal, Andhra Pradesh dated 18th January, 1964 in Industrial Dispute No. 33 of 1963 and published in *Gazette of India* No. 6, dated 8th February, 1964.

K. Veeranna was employed as a Clerk by the Syndicate Bank Ltd (hereinafter called the 'Bank') in the Vijayawada branch. An order was made on 2nd May, 1963 for the transfer of Veeranna from Vijayawada to a new branch of the Bank which was to open at Banganpalli. Veeranna refused to join duty at Banganpalli and applied for leave on medical grounds. Veeranna continued to remain on such leave till 12th December, 1963 when the Bank had to post one Chandrasekhar from the Nandyal branch to the Banganpalli branch in place of Veeranna. In June, 1963 Veeranna was elected as Joint Treasurer of the Andhra Pradesh unit of the respondent's Union. Veeranna claimed that he was entitled to exemption from transfer under the Sastry Award and the dispute was referred for adjudication by the Government of India under section 10 (1) (d) of the Industrial Disputes Act to the Industrial Tribunal, Hyderabad. The issue was

"Whether the transfer of K. Veeranna a workman of Canara Industrial and Syndicate Bank Ltd, from Vijayawada to Banganpalli is justified and if not, to what relief is the workman entitled?"

After hearing the evidence adduced by the parties the Industrial Tribunal decided the issue in favour of the respondent's Union and held that the transfer of Veeranna was prompted by *mala fide* considerations and, therefore, he was entitled to be retained at Vijayawada.

On behalf of the appellant, Mr. Setalvad put forward the argument that the finding of the Tribunal is perverse and is not supported by any evidence and that the award of the Tribunal may, therefore, be set aside as being defective in law. In our opinion, the argument of Mr. Setalvad is well-founded and must be accepted as correct. The Tribunal has stated, in the first place, that the order of transfer was *mala fide* because the Bank had framed charges against Veeranna regarding a scheme of pigmy collections and the transfer was an attempt to victimise Veeranna for the part he had taken in the dispute between the Bank and the employees in this connection. It appears that the Bank had framed charges against Veeranna in September, 1962 and the dispute about the pigmy collections arose because the Reserve Bank of India, acting under the provisions of the Banking Companies Act, objected to the payment of allowance to the employees of the Bank by virtue of the Deposit Scheme and therefore the Bank had to suspend the collection of deposits by members of its staff. It appears that Veeranna refused to surrender the Collection Cards etc. though he was asked to do so twice by the Bank by notice in writing. After the framing of the charges on 20th November, 1962 for indiscipline an enquiry was held by the Bank and the charges were found proved against Veeranna. But the significant fact is that Veeranna was subsequently pardoned by the Bank and no action was taken against him. Veeranna himself admitted in his deposition as follows:

"There was a domestic enquiry and after the enquiry the recommendation was that I shall be dismissed but the Managing Director pardoned me."

It is, therefore, clear that the dispute concerning pigmy deposits was settled between the Bank and the workmen on 20th January, 1963 on which date the parties to the settlement agreed to refer the dispute to the Industrial Tribunal. It is far-fetched to say that there is any connection between that dispute and the order of transfer made on 2nd May, 1963. The second reason given by the Tribunal is that Veeranna was Joint Treasurer of the Provincial unit of the All India Union and the transfer was made by the Bank as the Bank wanted to victimise Veeranna and to deprive the Union of his services as an office-bearer of the Union. But it is the admitted position that Veeranna was elected to the office of Joint Treasurership in June, 1963 *i.e.*, about a month after his transfer order was issued and the Bank could not have known at the time of making the order of transfer that Veeranna would be elected as the Joint Treasurer of the Union. It is, therefore, not possible to attribute bad faith to the Bank in making the order of transfer of Veeranna. The third reason given by the Tribunal is that there was an alternative person *viz.*, Balaramiah Chetty who could have been transferred to Banganpalli in place of Veeranna but the alternative arrangement was not deliberately made and Veeranna was forced to go to Banganpalli. It appears from the evidence that Balaramiah Chetty made an application on 24th April, 1962, for transfer to Raichuti or Banganpalli but at that time he was working at Madras which is regarded as Area I for the purpose of remuneration under the Desai Award. Therefore, in the event of transfer of Balaramiah Chetty the Bank would have had to continue paying him the Area I remuneration and would also have had to pay his substitute in Madras at the same rate. The post at Banganpalli was in a lower remuneration area and the transfer of someone from a similar remuneration area, such as Vijayawada, would have involved the Bank in no extra cost. The Bank had, therefore, offered to transfer Balaramiah Chetty on condition that he should be prepared to receive the remuneration of the area where he desired to be posted. As this condition was not acceptable to Balaramiah Chetty the transfer order was issued to Veeranna on 2nd May, 1963.

Lastly, the Tribunal has stated that Veeranna was under an apprehension that on account of the transfer he would be deprived of a special allowance of Rs 20 which was payable to him under the Desai Award. There is no substance in this point because the Bank has said that Veeranna was posted as a Clerk at Banganpalli in the same scale of pay and was entitled to the same allowance as he was drawing at Vijayawada. It is also stated by the Bank's witness before the Tribunal that Veeranna would be paid Rs. 20 allowance even at Banganpalli. Having analysed the evidence in this case, we are of opinion that the finding of the Tribunal that the transfer of Veeranna is *mala fide* is not supported by any evidence and it is, therefore, perverse and defective in law. There is no doubt that the Banks are entitled to decide on a consideration of the necessities of banking business whether the transfer of an employee should be made to a particular branch. There is also no doubt that the management of the Bank is in the best position to judge how to distribute its employees between the different branches. We are, therefore, of opinion that Industrial Tribunals should be very careful before they interfere with the orders made by the Banks in discharge of their managerial functions. It is true that if an order of transfer is made *mala fide* or for some ulterior purpose, like punishing an employee for his trade union activities, the Industrial Tribunals should interfere and set aside such an order of transfer, because the *mala fide* exercise of power is not considered to be the legal exercise of the power given by law. But the finding of *mala fide* should be reached by Industrial Tribunals only if there is sufficient and proper evidence in support of the finding. Such a finding should not be reached capriciously or on flimsy grounds as the Industrial Tribunal has done in the present case. This view is borne out by the decision of this Court in *Bareilly Electricity Supply Co., Ltd v Sirajuddin and others*.*

For these reasons we allow this appeal and set aside the order of the Industrial Tribunal dated 18th January, 1964 and hold that transfer of Veeranna from Vijayawada to Banganpalli was justified and the issue referred to the Industrial Tribunal should be answered in favour of the Bank. There will be no order as to costs.

V S

Appeal allowed

THE SUPREME COURT OF INDIA

(Civil Appellate Jurisdiction)

PRESENT.—A K SARKAR, K N WANCHOO AND J R. MUDHOLKAR, JJ

Addanki Narayanappa and another

Appellants*

v

Bhaskara Krishnappa (dead) and thereafter his heirs and others

Respondents

Registration Act (XV of 1908), section 17 (1)—Applicability—Karar executed by a partner—His share in the 'machine etc and business' given up and 'made over' to the other partner—Recital, certain immovable property 'had been given' to executant—Partnership Act (IX of 1932), section 48

The document in question a *karar* executed by A (a partner) recorded the fact that the partnership had come to an end, that A had given up his share in the 'machine etc. and the business' and the same had been 'made over' to the other partner B alone completely by way

of adjustment and also recited that A had been given certain immovable property (trading asset) of the business by B. It was not registered. On the question of the validity of the document,

Held, from a perusal of the provisions of section 48 of the Partnership Act (IX of 1932) it is clear that whatever be the character of the property brought in by the partners or acquired in the course of the business it becomes the property (trading assets) of the firm; a partner is entitled only to his share of the profits, if any, accruing and upon dissolution to a share in the moneys realised which represents the value of the property. A partner, on retirement is entitled only to get his share of the partnership assets, as on the date of retirement, realised and converted into money after a deduction of the liabilities and prior charges. He has no rights in immovable properties as such.

The *karar* in the instant case cannot be said to convey any immovable property by a partner to another expressly or by necessary implication. The recital that some immovable property had been given to the retiring partner had already taken place. It does not require registration for its validity.

Gopal Chetty v. Viraraghavachariar, L. R. 1922 A.C. 1: 43 M.L.J. 305: I.L.R. 45 Mad. 378 (P.C.), relied on.

Samuier v. Ramasubbier, (1931) 60 M.L.J. 527: I.L.R. 55 Mad. 72 and *Joharmul v. Tejram Jagrup*, (1893) I.L.R. 17 Bom. 235, not approved.

Appeal by Special Leave from the Judgment and Decree dated the 8th December 1958 of the Andhra Pradesh High Court in Second Appeal No. 845 of 1953.†

Alladi Kuppuswami and R. Gopalakrishnan, Advocates, for Appellants.

N.C. Chatterjee and S. G. Patwardhan, Senior Advocates, *S. Balakrishnan*, Advocate and *R. Thiagarajan*, Advocate for *N.S. Mani*, Advocate, with them, for Respondents Nos. 4, 7 and 8.

The Judgment of the Court was delivered by

Mudholkar, J.—In this appeal by Special Leave from a judgment of the High Court of Andhra Pradesh the question which arises for consideration is whether the interest of a partner in partnership assets comprising of movable as well as immovable property should be treated as movable or immovable property for the purposes of section 17 (1) of the Registration Act, 1908. The question arises in this way. Members of two joint Hindu families, to whom we would refer for convenience as the Addanki family and the Bhaskara family, entered into partnership for the purpose of carrying on business of hulling rice, decorticating groundnuts etc. Each family had half share in that business. The capital of the partnership consisted, among other things, of some lands belonging to the families. During the course of the business of the partnership some more lands were acquired by the partnership. The plaintiffs who are two members of the Addanki family instituted a suit in the Court of Subordinate Judge, Chittoor on 4th March, 1949, for the following reliefs:

“(a) for a declaration that the suit properties belong to the plaintiffs and defendants 10 to 14 and defendants 1 to 9 equally, for a division of the same into four equal shares, one share to be delivered to the plaintiffs or for a division of the same into two equal shares to be delivered to the plaintiffs and the defendants 10 to 14 jointly;

(b) or in the alternative dissolving the partnership between the plaintiffs and defendants 10 to 14 on the one hand and defendants 1 to 9 on the other hand directing accounts to be taken;

(c) directing the defendants 1 to 9 to render accounts of the income of the suit properties;

(d) directing the defendants 1 to 9 to pay the costs of the suit to the plaintiffs;

(e) and pass such further relief as may be deemed fit in the circumstances of the case.”

It may be mentioned that in their suit the plaintiffs made all the members of the Bhaskara family as defendants and also joined those members of the Addanki

family who had not joined as plaintiffs. We are concerned here only with the defence of the members of the Bhaskara family. According to them the partnership was dissolved in the year 1936 and accounts were settled between the two families. In support of this plea they have relied upon a *karar* executed in favour of Bhaskara Gurappa Setty, who was presumably the *karta* of Bhaskara family by five members of the Addanki family, who presumably represented all the members of the Addanki family. Therefore, according to the Bhaskara defendants, the plaintiffs had no cause of action. Alternatively they contended that the suit was barred by time. In the view which we take it would not be necessary to consider the second defence raised by the Addanki family.

The relevant portion of the *karar* reads thus

"As disputes have arisen in our family regarding partition, it is not possible to carry on the business or to make investment in future. Moreover you yourself have undertaken to discharge some of the debts payable by us to the coastal parts in connection with our private business. Therefore, from this day onwards we have closed the joint business. So, from this day onwards, we have given up (our) share in the machine etc., and in the business, and we have made over the same to you alone completely by way of adjustment. You yourself shall carry on the business without ourselves having anything to do with the profit and loss. Herefor, you have given up to us the property forming our Venkatasubbayya's share which you have purchased and delivered possession of the same to us even previously. In case you want to execute and deliver a proper document in respect of the share which we have given up to you, we shall at your own expense, execute and deliver a document registered."

This document on its face shows that the partnership business had come to an end and that the Addanki family had given up their share in the "machine etc., in the business" and had made it over to the Bhaskara family. It also recites the fact that the Addanki family had already received certain property which was purchased by the partnership presumably as that family's share in the partnership assets. The argument advanced by Mr Alladi Kuppaswami is that since the partnership assets included immovable property and the document records relinquishment by the members of the Addanki family of their interest in those assets, this document was compulsorily registrable under section 17 (1) (c) of the Registration Act and that as it was not registered it is inadmissible in evidence to prove the dissolution of the partnership as well as the settlement of accounts.

Direct cases upon this point of the Courts in India are few but before we examine them it would be desirable to advert to the provisions of the Partnership Act itself bearing on the interest of partners in partnership property. Section 14 provides that subject to contract between the partners the property of the firm includes all property originally brought into the stock of the firm or acquired by the firm for the purposes and in the course of the business of the firm. Section 15 provides that such property shall ordinarily be held and used by the partners exclusively for the purposes of the business of the firm. Though that is so a firm has no legal existence under the Act and the partnership property will, therefore, be deemed to be held by the partners for the business of the partnership. Section 29 deals with the rights of a transferee of a partner's interest and sub-section (1) provides that such a transferee will not have the same rights as the transferor partner but he will be entitled to receive the share of profits of his transferor and that he will be bound to accept the account of profits agreed to by the partners. Sub-section (2) provides that upon dissolution of the firm or upon a transferor-partner ceasing to be a partner the transferee would be entitled as against the remaining partners to receive the share of the assets of the firm to which his transferor was entitled and will also be entitled to an account as from the date of dissolution. Section 30 deals with the case of a minor admitted to the benefits of partnership. Such minor is given a right to his share of the property of the firm and also a right to a share in the profits of the firm as may be agreed upon. But his share will be liable for the acts of the firm though he would not be personally liable for them. Sub-section (4) however, debars a minor from suing the partners for accounts or

for his share of the property or profits of the firm save when severing his connection with the firm. It also provides that when he is severing his connection with the firm the Court shall make a valuation of his share in the property of the firm. Sections 31 to 38 deal with incoming and outgoing partners. Some of the consequences of retirement of a partner are dealt with in sub-sections (2) and (3) of section 32 while some others are dealt with in sections 36 and 37. Under section 37 the outgoing partner or the estate of a deceased partner, in the absence of a contract to the contrary, would be entitled to at the option of himself or his representatives to such share of profits made since he ceased to be a partner as may be attributable to the property of the firm or to interest at the rate of six per cent. per annum on the amount of his share in the property of the firm. The subject of dissolution of a firm and the consequences are dealt with in Chapter VI, sections 39 to 55. Of these the one which is relevant for this discussion is section 48 which runs thus :

"In settling the accounts of a firm after dissolution the following rules shall, subject to agreement by the partners, be observed:

(a) Losses, including deficiencies of capital, shall be paid first out of profits, next out of capital and, lastly, if necessary, by the partners individually in the proportions in which they were entitled to share profits.

(b) The assets of the firm, including any sums contributed by the partners to make up deficiencies of capital, shall be applied in the following manner and order:—

(i) in paying the debts of the firm to third parties ;

(ii) in paying to each partner rateably what is due to him from the firm for advances as distinguished from capital ;

(iii) in paying to each partner rateably what is due to him on account of capital ; and

(iv) the residue, if any, shall be divided among the partners in the proportions in which they were entitled to share profits."

From a perusal of these provisions it would be abundantly clear that whatever may be the character of the property which is brought in by the partners when the partnership is formed or which may be acquired in the course of the business of the partnership it becomes the property of the firm and what a partner is entitled to is his share of profits, if any, accruing to the partnership from the realisation of this property, and upon dissolution of the partnership to a share in the money representing the value of the property. No doubt, since a firm has no legal existence, the partnership property will vest in all the partners and in that sense every partner has an interest in the property of the partnership. During the subsistence of the partnership, however, no partner can deal with any portion of the property as his own. Nor can he assign his interest in a specific item of the partnership property to anyone. His right is to obtain such profits, if any, as fall to his share from time to time and upon the dissolution of the firm to a share in the assets of the firm which remain after satisfying the liabilities set out in clause (a) and sub-clauses (i), (ii) and (iii) of clause (b) of section 48. It has been stated in *Lindley on Partnership* 12th ed. at p. 375:

"What is meant by the share of a partner is his proportion of the partnership assets after they have been all realised and converted into money, and all the partnership debts and liabilities have been paid and discharged. This it is, and this only which on the death of a partner passes to his representatives, or to a legatee of his share..... and which on his bankruptcy passes to his trustee."

This statement of law is based upon a number of decisions of the English Courts. One of these is *Rodriguez v. Speyer Bros*¹, where at p. 68 it has been observed:

"When a debt due to a firm is got in no partner has any definite share or interest in that debt ; his right is merely to have the money so received applied, together with the other assets, in discharging the liabilities of the firm, and to receive his share of any surplus there may be when the liquidation has been completed."

No doubt this decision was subsequent to the enactment of the English Partnership Act of 1890. Even in several earlier cases, as for instance, *Darby v Darby*,¹ the same view has been expressed. That was a case where two persons purchased lands on a joint speculation with their joint monies for the purpose of converting them into building plots and reselling them at a profit or loss. It was held by Kmdserley V C that there was a conversion of the property purchased out and out and upon the death of one of the partners his share in the part of the unrealised estate passed to his personal representatives. After examining the earlier cases the learned Vice Chancellor observed at p 995

"The result then of the authorities may be thus stated — Lord Thurlow was of opinion that a special contract was necessary to convert the land into personality and Sir W Grant followed that decision. Lord Eldon on more than one occasion strongly expressed his opinion that Lord Thurlow's decision was wrong. Sir J Leach clearly decided in three cases that there was conversion out and out, and Sir L Shadwell, in the last case before him, clearly decided in the same way. That is the state of the authorities.

Now it appears to me that irrespective of authority, and looking at the matter with reference to principles well established in this Court, if partners purchase land merely for the purpose of their trade, and pay for it out of the partnership property, that transaction makes the property personality, and effects a conversion out and out."

He then observed

"This principle is clearly laid down by Lord Eldon in *Crawshay v Collins*² and by Sir W Grant in *Featherstonhaugh v Fenwick*³ and the right of each partner to insist on a sale of all the partnership property, which arises from what is implied in the contract of partnership is just as stringent as a special contract would be. If, then this rule applies to ordinary stock in trade why should it not apply to all kinds of partnership property? Suppose that partners, for the purpose of carrying on their business, purchase, out of the funds of the partnership leasehold estate or take a lease of land, paying the rent out of the partnership funds, can it be doubted that the same rule which applies to ordinary chattels would apply to such leasehold property? I do not think it was ever questioned that, on a dissolution, the right of each partner to have the partnership effects sold applies to leasehold property belonging to the partnership as much as to any other stock in trade. No one partner can insist on retaining his share unsold. Nor would it make any difference in whom the legal estate was vested, whether in one of the partners or in all, this Court would regulate the matter according to the equities. And Sir W. Grant so decided in *Featherstonhaugh v Fenwick*."

We have quoted extensively from this decision because of the argument that the decision in *Rodriguez's case*,⁴ would have been otherwise but for section 22 of the English Act. Adverting to this Lindley has said

From the principle that a share of a partner is nothing more than his proportion of the partnership assets after they have been turned into money and applied in liquidation of the partnership, whether its property consists of land or not must, as between the real and personal representatives of a deceased partner, be deemed to be personal and not real estate unless indeed such conversion is inconsistent with the agreement between the parties. Although the decisions upon this point were conflicting the authorities which were in favour of the foregoing conclusion certainly preponderated over the others and all doubt upon the point has been removed by the Partnership Act, 1890, which contains the following section

"22. 'Where land or any heritable interest therein has become partnership property, it shall, unless the contrary intention appears, be treated as between the partners (including the representative of a deceased partner) and also as between the heirs of a deceased partner and his executors or administrators as personal or movable and not real or heritable estate'."

Even in a still earlier case [*Foster v Hale*]⁵ a person attempted to obtain an account of the profits of a colliery on the ground that it was partnership property and it was objected that there was no signed writing, such as the Statute of Frauds required. Dealing with it the Lord Chancellor observed

"That was not the question it was whether there was a partnership. The subject being an agreement for land the question then is whether there was a resulting trust for that partnership by operation of law. The question of partnership must be tried as a fact, and as if there was an issue upon it. If by facts and circumstances it is established as a fact that these persons were

1 (1856) 61 E. R. 992.

2 (1808) 15 Ves 218

3 (1810) 17 Ves 298

4 L.R. (1919) A.C. 59.

5 (1800) 5 Ves. 308

partners in the colliery, in which land was necessary to carry on the trade, the lease goes as an incident. The partnership being established by evidence upon which a partnership may be found, the premises necessary for the purposes of that partnership are by *operation of law* held for the purposes of that partnership."

It is pointed out by Lindley that this principle is carried to its extreme limit by Vice-Chancellor Wigram in *Dale v. Hamilton*¹. Even so, it is pointed out that it must be treated as a binding authority in the absence of any decision of the Court of Appeal to the contrary.

It seems to us that looking to the scheme of the Indian Act no other view can reasonably be taken. The whole concept of partnership is to embark upon a joint venture and for that purpose to bring in as capital money or even property including immovable property. Once that is done whatever is brought in would cease to be the exclusive property of the person who brought it in. It would be the trading asset of the partnership in which all the partners would have interest in proportion to their share in the joint venture of the business of partnership. The person who brought it in would, therefore, not be able to claim or exercise any exclusive right over any property which he has brought in, much less over any other partnership property. He would not be able to exercise his right even to the extent of his share in the business of the partnership. As already stated his right during the subsistence of the partnership is to get his share of profits from time to time as may be agreed upon among the partners and after the dissolution of the partnership or with his retirement from partnership of the value of his share in the net partnership assets as on the date of dissolution or retirement after a deduction of liabilities and prior charges. It is true that even during the subsistence of the partnership a partner may assign his share to another. In that case what the assignee would get would be only that which is permitted by section 29 (1), that is to say, the right to receive the share of profits of the assignor and accept the account of profits agreed to by the partners. There are not many decisions of the High Courts on the point. In the few that there are the preponderating view is in support of the position which we have stated. In *Joharmal v. Tejram Jagrup*² which was decided by Jardine and Telang, J.J., the latter took the view that though a partner's share does not include any specific part of any specific item of partnership property, still where the partnership is entitled to immovable property, such share does include an interest in immovable property and, therefore, every instrument operating to create or transfer a right to such share requires to be registered under the Registration Act. In coming to this conclusion he mainly purported to rely upon an observation contained in the fifth edition of Lindley on Partnership at p. 347. This observation is not to be found in the present edition of Lindley's Partnership nor in the 9th or 10th editions which were brought to our notice. The 5th edition, however, is not available. The learned Judge after quoting an earlier statement which is that the "doctrine merely amounts to this that on the death of a partner his share in the partnership property is to be treated as money, not as land" says :

"This obviously would not affect matters either during the lifetime of a partner—Lindley, L. J., says in so many words that it has no practical operation till his death (p. 348)—or as against parties strangers to the partnership, e.g., the firm's debtors."

While it is true that the position so far as third persons are concerned would be different it may be pointed out that in *Forbes v. Steven*³ James, V. C., has, as quoted by the learned Judge, said :

"It has long been the settled law of this Court that real estate bought or acquired by a partnership for partnership purposes (in the absence of some controlling agreement or direction to the contrary) is, as between the partners and as between the real and personal property, and devolves and is distributable and applicable as personal estate and as legal assets."

1. (1846) 5 Hare 369 on [appeal to (1847) 2 Ph. 266.

2. (1893) I.L.R. 17 Bom. 235.
3. L.R. (1870) 10 Eq. 178.

Telang, J, seems to have overlooked, and we say so with great respect, the words 'as between the partners' which precede the words "and as between the real and personal representative of the partner deceased" and to have confined his attention solely to the latter. We have not found in any of the editions of Lindley's Partnership an adverse criticism of the view of the Vice Chancellor. But, on the contrary as already stated, the view expressed is in full accord with these observations. Jardine J, has discussed the English authorities at length and after referring to the documents upon which reliance was placed on behalf of the defendant stated his opinion thus

'To lay down that the three letters in question which deal generally with the assets, movable and immovable without specifying any particular mortgage or other interest in real property require registration would, I incline to think, in the present state of the authorities go too far. It may be argued that such letters are not instruments of gift of immovable property but rather disposals of a share in a partnership of which the business is money lending and the mortgage securities merely incidental thereto'

The view of Telang, J, was not accepted by the Madras High Court in *Chitturi Venkataratnam v Subba Rao*¹. The learned Judges there discussed all the English decisions as also the decision in *Sudarsanam Maistri v Narasimulu Maistri*² and *Gopala Chetty v Vijayaraghavachariar*³ and the opinion of Jardine, J, in *Joharmal's case*⁴ and held that an unregistered deed of release by a partner of his share in the partnership business is admissible in evidence, even where the partnership owns immovable property. The learned Judges pointed out that though a partner may be a co-owner in the partnership property he has no right to ask for a share in the property but only that the partnership business should be wound up including therein the sale of immovable property and to ask for his share in the resulting assets. This decision was not accepted as laying down the correct law by a Division Bench of the same High Court in *Samuvier v Ramasubbier*⁵. The learned Judges there relied upon the decision in *Ashworth v Munn*⁶ in addition to the opinion of Telang, J, and also referred to the decision in *Gray v Smith*⁷ in coming to a conclusion contrary to the one in the earlier case. It may be pointed out that the learned Judges have made no reference to the decision of the Privy Council in *Gopala Chetty's case*³ though that was one of the decisions relied upon by Philips, J, in the earlier case. In so far as *Ashworth's case*⁶ is concerned that was a case which turned on the provisions of the Mortmain Acts and is not quite pertinent for the decision on the point which was before them and which is now before us. In *Gray v Smith*⁷ Kekewich J, held that an agreement by one of the partners to retire and to assign his share in the partnership assets including immovable property, is an agreement to assign an interest in land and falls within the Statute of Frauds. The view of Kekewich, J, seems to have received the approval of Cotton L J, one of the Judges of the Court of Appeal, though no argument was raised before it challenging its correctness. It may, however, be observed that even according to Kekewich, J, the authorities (*Foster v Hale*⁸ and *Dale v Hamilton*⁹) establish that one may have an agreement of partnership by parol, notwithstanding that the partnership is to deal with land. He, however, went on to observe

'But it does not seem to me to follow that an agreement for the dissolution of such a partnership need not be expressed in writing or rather that there need not be a memorandum of the agreement for dissolution when one of the terms of the agreement, either expressly or by necessary implication is that the party sought to be charged must part with and assign to others an interest in land. That seems to me to give rise to entirely different consideration. In the

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| 1 (1926) 51 M.L.J. 410 I.L.R. 49 Mad | 5 (1931) 60 M.L.J. 527 I.L.R. 55 Mad 72. |
| 738 | 6 (1880) 15 Ch D 363 |
| 2 (1902) 11 M.L.J. 353 I.L.R. 25 Mad | 7 (1889) 43 Ch D 208 |
| 149 | 8 (1800) 5 Ves 308 |
| 3 L.R. (1922) 1 A.C. 488 I.L.R. 45 Mad | 9 (1846) 5 Hare 369 on appeal to (1847) |
| 378 | 2 Ph 266 |
| 4 (1893) 1 I.L.R. 17 Bom. 235 | |

one case you prove the partnership by parol; you prove the object, the terms of the partnership, and so on. But in the other case it is one of the essential terms of the agreement that the party to be charged shall convey an interest in land, and that seems therefore to bring it necessarily within the 4th section of the Statute of Frauds."

In the case before us, as also in *Samuvier's case*¹ the document cannot be said to convey any immovable property by a partner to another expressly or by necessary implication. If we may recall, the document executed by the Addanki partners in favour of the Bhaskara partners records the fact that the partnership business has come to an end and that the latter have given up their share in "the machine etc., and in the business" and that they have "made over same to you alone completely by way of adjustment". There is no express reference to any immovable property herein. No doubt, the document does recite the fact that the Bhaskara family has given to the Addanki family certain property. This, however, is merely a recital of a fact which had taken place earlier. To cases of this type the observations of Kekewich, J., which we have quoted do not apply. The view taken in *Samuvier's case*¹ seemed to commend itself to Varadachariar, J., in *Thirumalappa v. Ramappa*² but he was reversed in *Ramappa v. Thirumalappa*.³

We may also refer to the decision of a Full Bench in *Ajudhia Pershad Ram Pershad v. Sham Sunder and others*,⁴ in which Cornelius, J., has discussed most of the decisions we have earlier referred to, in addition to several others and reached the conclusion that while a partnership is in existence, no partner can point to any part of the assets of the partnership as belonging to him alone. After examining the relevant provisions of the Act, the learned Judge observed :

"These sections require that the debts and liabilities should first be met out of the firm property and thereafter the assets should be applied in rateable payment to each partner of what is due to him firstly on account of advances as distinguished from capital and, secondly on account of capital, the residue, if any, being divided rateably among all the partners. It is obvious that the Act contemplates complete liquidation of the assets of the partnership as a preliminary to the settlement of accounts between partners upon dissolution of the firm and it will, therefore, be correct to say that, for the purposes of the Indian Partnership Act, and irrespective of any mutual agreement between the partners, the share of each partner is, in the words of Lindley: 'his proportion of the partnership assets after they have been all realised and converted into money, and all the partnership debts and liabilities have been paid and discharged'."

This indeed is the view which has commended itself to us.

Mr. Kuppaswamy then referred us to two decisions of English Courts in *In re: Fuller's Contract*⁵ and *Burdett Coutts v. Inland Revenue Commissioners*⁶ and on the passage at pages 394 and 395 in Lindley's Partnership under the head "Form of Transfer" in support of his argument. Both the cases relied upon deal with contracts with third parties and not with agreements between partners *inter se* concerning retirement or dissolution. The passage from Lindley deals with a case where there is an actual transfer of immovable property and is, therefore, not in point.

Mr. Chatterjee brought to our notice some English decisions in addition to those we have adverted to in support, which agree with the view taken in those cases. He has also referred to the decisions in *Prem Raj Brahmin v. Bhani Ram Brahmin*⁷ and *Firm Ram Sahaymall v. Bishwanath Prasad*⁸. We do not think it necessary to discuss them because they do not add to what we have already said in support of our view.

For these reasons we uphold the decree of the High Court and dismiss the appeal with costs.

Appeal dismissed.

K. G. S.

1. (1931) 60 M.L.J. 527; I.L.R. 55 Mad. 72.

2. A.I.R. 1938 Mad. 133.

3. A.I.R. 1939 Mad. 884.

4. A.I.R. 1947 Lah. 13 (F.B.).

5. L.R. (1933) Ch.D. 652.

6. (1960) 1 W.L.R. 1027.

7. I.L.R. (1946) 1 Cal. 191.

8. A.I.R. 1963 Pat. 221.

THE SUPREME COURT OF INDIA (Civil Appellate Jurisdiction)

PRESENT:—K. SUBBA RAO, M. HIDAYATULLAH AND R. S. BACHAWAT, JJ

Everest Apartments Co-operative Housing Society Ltd, Bombay Appellant*

v

The State of Maharashtra and others Respondents

Maharashtra Co-operative Societies Act (XXIV of 1961), sections 23 (3) and 154—Scope of section 154—Finality of order under section 23 (3) whether subject to section 154—Power under section 154 if can be exercised on application by a party

The finality under section 23 (3) of the Maharashtra Co-operative Societies Act of an order made under section 23 (2) is subject to the revisional powers conferred on the State Government under section 154 of the Act. There is no doubt that section 154 is potential but not compulsive. Power is reposed in Government to intervene to do justice when occasion demands it and of the occasion for its exercise Government is made the sole judge. This power can be exercised in all cases except in a case in which a similar power has already been exercised by the Tribunal under section 149 (9). The exception was considered necessary because the legality or the propriety of an order having once been considered, it would be an act of supererogation to consider the matter twice. It follows that Government can exercise its powers under section 154 in all cases with one exception only and that the finality of the order under section 23 (3) does not restrict the exercise of power under section 154. The word 'final' in section 23 (3) in the context means that the order is not subject to an ordinary appeal or revision but it does not touch the special power legislatively conferred on Government by section 154.

It cannot also be contended that the action by Government under section 154 is intended to be on its own motion and not by application by a party. As Government is not compelled to take action unless it thinks fit, the party who moves Government cannot claim that he has a right of appeal or revision. But that does not mean that a party is prohibited from moving Government by an application to exercise the power conferred under section 154.

Appeal by Special Leave from the order dated the 30th June, 1965 of the Bombay High Court in Special Civil Application No 1027 of 1965.

S V Gupte, Solicitor-General of India (*N.N. Keswani*, Advocate, with him), for Appellant.

Niren De, Additional Solicitor-General of India (*B.R.G.K. Achar*, Advocate, with him), for Respondent No 1.

The Judgment of the Court was delivered by

Hidayatullah, J—In this appeal by Special Leave we are not concerned with the merits of the controversy between the appellant and the fourth respondent, who are the contesting parties, because only two short questions of law arise for our decision. The appellant is a registered Co-operative Housing Society, registered under the Maharashtra Co-operative Societies Act, 1960 (XXIV of 1961). The Society was promoted by two individuals for the construction of a block of flats in Bombay. Shivdasani (respondent 4) claims to have paid the entrance fee, share money and other demands and complains that his membership was wrongly rejected by the Society. The Society denies these statements and the claim. We are not concerned with the details of this dispute. What we are concerned with is this. On being informed of the rejection of his application for membership, Shivdasani filed an appeal under section 23 (2) of the above Act, which was heard and decided in his favour by the District Deputy Registrar, Co-operative Societies, Bombay. The Society filed an application before the State Government for revision purporting to be under section 154 of the Act. This application was rejected. The Society was

intimated this result by the Under Secretary to the Government of Maharashtra (Agriculture and Co-operative Department) and the communication (CAR/1064/426690/C-42, 17th May, 1965) was as follows :—

Sir,

I am directed to state that following the hearing to you by the Deputy Secretary of this Department on 10th March, 1965, in connection with the subject noted above, a note was received in this Department from Shri M. G. Mani, Advocate wherein it was claimed that though an order was final under section 23 (3) of the Maharashtra Co-operative Societies Act, 1960, Government had inherent revisionary powers under section 154 of the said Act to entertain such representations against such an order. I am to inform you that the matter has been examined by Government and to state that in such cases orders given under section 23 (3) are final and Government has no revisional jurisdiction in such a matter.

Yours faithfully,

Sd./- (D. A. Ekbote)

Under Secretary to Government.

The Society filed a petition under Articles 226 and 227 of the Constitution in the High Court of Bombay which was also rejected (S.C.A. No. 1027 of 1965, 30th June, 1965). The High Court passed a short and laconic order which reads :

“Government right in declaring no jurisdiction. It is wrong to say that respondent had withdrawn the application voluntarily. Attitude of the Society unjust. Admittedly the promoters were members of Everest Co., and they wanted Rs. 3, 000/- from each one for themselves.

Societies are not meant for self-aggrandizement.

No ground to interfere.

Rejected”.

It is against the last order that the present appeal has been brought and the first question is whether the Government is right in law in declining to interfere because it has “no revisional jurisdiction in such a matter”. The answer to this question depends upon the construction of section 154 of the Act but before we attempt it, we shall say something about the Act and the provisions applicable to this case.

The Maharashtra Co-operative Societies Act, which replaced the Bombay Co-operative Societies Act, 1925 was passed to provide for the orderly development of the co-operative movement in the State of Maharashtra. It deals, among others, with housing societies, the object of which is to provide their members with dwelling houses. Every society having as its objects the promotion of the economic interests or general welfare of its members, or of the public, in accordance with co-operative principles and which is economically sound may register under the Act. This entitles the societies to obtain certain benefits. The State Government appoints a Registrar of Co-operative Societies, who has numerous powers under the Act, and may appoint one or more persons to assist him and may confer all or any of the powers of the Registrar upon them. Chapter II of the Act then deals with registration of societies and all matters connected therewith. Chapter III next deals with members and their rights and liabilities. Section 22 in that Chapter lays down who may become a member of a society and by its second sub-section provides :

“22. *Person who may become member.*— (1)

(2) Where a person is refused admission as a member of a society, the decision (with the reasons therefor) shall be communicated to that person within fifteen days of the date of the decision, or within three months from the date of the application for admission,—whichever is earlier.”

Section 23 then gives a right of appeal to a member who has been refused admission. It provides :

“23. *Open membership.*— (1) No society shall, without sufficient cause, refuse admission to membership to any person duly qualified therefor under the provisions of this Act and its by-laws.

(2) Any person aggrieved by the decision of a society, refusing him admission to its membership, may appeal to the Registrar.

(3) The decision of the Registrar in appeal, shall be final and the Registrar shall communicate his decision to the parties within fifteen days from the date thereof."

The appeal of Shrivdasani was made under the above section. After the order in appeal was passed by the Registrar, the Society moved the State Government under section 154 to exercise its powers under that section. It reads:

"154. *Power of State Government and Registrar to call for Proceedings of Subordinate Officer and to pass orders thereon*—The State Government and the Registrar may call for and examine the record of any inquiry or the proceedings of any other matter of any officer subordinate to them, except those referred to in sub section (9) of section 149 for the purpose of satisfying themselves as to the legality or propriety of any decision or order passed, and as to the regularity of the proceedings of such officer. If in any case, it appears to the State Government, or the Registrar, that any decision or order or proceedings so called for should be modified, annulled or reversed, the State Government or the Registrar, as the case may be, may after giving persons affected thereby an opportunity of being heard pass such order thereon as to it or him may seem just."

The State Government held that it had no jurisdiction as orders given under section 23 (3) were final. Two questions arise here: (i) Is the finality under section 23 (3) subject to section 154, and (ii) Has a party a right to move the State Government under section 154?

Mr. Niren De defending the order of the State Government as well as that of the High Court, admits that the State Government has been given a power to call for and examine the record of any inquiry or the proceedings of any other matter of any officer subordinate to it, except those referred to in sub-section (9) of section 149, and that as the present is not a matter under section 149 (9) the power could be exercised by Government for the purpose of satisfying itself as to the legality or propriety of the order. In other words, he does not contest that the finality stated by section 23 (3) does not affect the power of the State Government. In making this submission he is clearly right. The Act has provided for appeals in other sections and the decision on appeal is stated to be final. Yet the power of superintendence is given to the State Government in general terms in respect of any inquiry or proceeding with only one exception, namely, the proceedings of the Maharashtra State Tribunal, when the Tribunal calls for and examines the record of any proceeding in which an appeal lies to it, for the purpose of satisfying itself as to the legality or propriety of any decision or order passed. By mentioning one specific exception to the general power, the Act has indicated an intention to include every other inquiry or proceeding within the action by Government as contemplated by section 154. Mr. De, however, contends, firstly, that the action by Government is intended to be on its own motion and not by application, and secondly, that the power need not be exercised unless Government itself feels that its exercise is necessary. He refers, by way of contrast, to the opening words of section 150 where provision is made for review of orders of the Tribunal in these words:

"150 *Review of orders of Tribunal*.—(1) The Tribunal may, either on the application of the Registrar, or on the application of any party interested, review its own order in any case, and pass in reference thereto such order as it thinks just;

Provided that, no such application made by the party interested shall be entertained, unless the Tribunal is satisfied that there has been the discovery of new and important matter of evidence, which after the exercise of due diligence was not within the knowledge of the applicant or could not be produced by him at the time when its order was made, or that there has been some mistake or error apparent on the face of the record, or for any other sufficient reason."

* * * *

Mr. De next submits that this power not being coupled with any duty need not be exercised by Government even if moved to take action, unless Govern-

ment itself feels inclined. He relies upon the *Commissioner of Income-tax, West Punjab v. The Tribune Trust, Lahore*.¹ In that case the question was whether section 33 of the Indian Income-tax Act, 1922 which conferred revisional jurisdiction on the Commissioner established a right to relief on the application of an assessee. It was contended by the assessee in that case that the relief claimed by them under section 33 was wrongly denied to them. In dealing with this contention Lord Simonds (later Viscount) observed as follows :—

“The fallacy implicit in this question has been made clear in the discussion of the first two questions. It assumes that section 33 creates a right in the assessee. In their Lordships’ opinion it creates no such right. On behalf of the respondent the well-known principle which was discussed in *Julius v. Bishop of Oxford*² was invoked and it was urged that the section which opens with the words ‘The Commissioner may of his own motion’ imposed upon him a duty which he was bound to perform upon the application of an assessee. It is possible that there might be a context in which words so inapt for that purpose would create a duty. But in the present case there is no such context. On the contrary section 33 follows upon a number of sections which determine the rights of the assessee and is itself, as its language clearly indicates, intended to provide administrative machinery by which a higher executive officer may review the acts of his subordinates and take the necessary action upon such review. It appears that as a matter of convenience a practice has grown up under which the Commissioner has been invited to act “of his own motion” under the section and where this occurs a certain degree of formality has been adopted. But the language of the section does not support the contention, which lies at the root of the third question and is vital to the respondent’s case, that, it affords a claim to relief. As has been already pointed out, appropriate relief is specifically given by other sections: it is not possible to interpret section 33 as conferring general relief.”

Mr. De also relies upon certain passages from *Julius v. Bishop of Oxford*² which show the distinction between power which is discretionary in its exercise and power which must be exercised every time the occasion for its exercise arises. He contends in the words of Talbot, J., in *Sheffield Corporation v. Luxford*³ that the word “may” always means “may” which is a permissive or enabling expression and that there are no circumstances either in the Act or in the facts here, by which it can be said that Government was under a duty to interfere. He submits that the order of Government must be read as indicating the above position and not that it had no jurisdiction.

There is no doubt that section 154 is potential but not compulsive. Power is reposed in Government to intervene to do justice when occasion demands it and of the occasion for its exercise, Government is made the sole Judge. This power can be exercised in all cases except in a case in which a similar power has already been exercised by the Tribunal under section 149 (9) of the Act. The exception was considered necessary because the legality or the propriety of an order having once been considered, it would be an act of supererogation to consider the matter twice. It follows, therefore, that Government can exercise its powers under section 154 in all cases with one exception only and that the finality of the order under section 23 (3) does not restrict the exercise of the power. The word ‘final’ in this context means that the order is not subject to an ordinary appeal or revision but it does not touch the special power legislatively conferred on Government. The Government was in error in considering that it had no jurisdiction in this case for it obviously had.

There remains the question whether a party has a right to move Government. The *Tribune Trust case*¹ is distinguishable and cannot help the submission that Government cannot be moved at all. The words of the two enactments are not materially equal. The Income-tax Act used the words *suo motu* which do not figure here. It is, of course, true that the words “on an application of a

1. (1948) 2 M.L.J. 14; L.R. 74 I.A. 306;
I.L.R. (1947) Lah. 809.

2. L.R. (1880) 5 A.C. 214.
3. L.R. (1929) 2 K.B. 180 at 183.

party" which occur in section 150 of the Act and in similar enactments in other Acts, are also not to be found. But that does not mean that a party is prohibited from moving Government. As Government is not compelled to take action, unless it thinks fit, the party who moves Government cannot claim that he has a right of appeal or revision. On the other hand, Government should welcome such applications because they draw the attention of Government to cases in some of which, Government may be interested to intervene. In many statutes, as for example the two major procedural Codes, such language has not only not inhibited the making of applications to the High Court but has been considered to give a right to obtain intervention, although the mere making of the application has not clothed a party with any rights beyond bringing a matter to the notice of the Court. After this is done, it is for the Court to consider whether to act or not. The extreme position does not obtain here because there is no right to interference in the same way as in a judicial proceeding. Government may act or may not act, the choice is of Government. There is no right to relief as in an appeal or revision under the two Codes. But to say that Government has no jurisdiction at all in the matter is to err, and that is what Government did in this case.

The order of the High Court in these circumstances overlooked that the Government had denied to itself a jurisdiction which it undoubtedly possessed by considering that the finality of the order under section 23 (3) precluded action under section 154. The High Court ought to have issued a *mandamus* to Government to deal with the application before it within its jurisdiction under section 154. That *mandamus* shall now issue to Government.

The appeal is thus allowed with costs

V K

Appeal allowed

THE SUPREME COURT OF INDIA

(Civil Appellate Jurisdiction)

PRESENT — P. B. GAJENDRAGADKAR, *Chief Justice*, K. N. WANCHOO, M. HIDAYATULLAH, V. RAMASWAMI AND P. SATYANARAYANA RAJU, JJ.
Shastri Yagnapurushdasji and others

*Appellants**

Muldas Bhundardas Vaishya and another

Respondents

The Advocate General for the State of Maharashtra

Intervener

Bombay Hindu Places of Public Worship (Entry Authorisation) Act (XXXI of 1956) sections 2 and 3 — Swaminarayana Sampradaya Satsangis — If distinct and separate from Hindus — Their religion if unconnected with Hindu religion — Swaminarayan Temple of Sree Narayana Dev at Ahmedabad and its subordinate temples — If Hindu Religious Institutions — Constitution of India (1950), Articles 25 and 26

The High Court of Bombay, on an appeal by the respondents herein, ultimately set aside the decree of the trial Court granting declaratory and injunctive relief and dismissed the suit filed by the appellants herein but granted a certificate of fitness for appeal to the Supreme Court.

In the instant appeal the appellants contended (a) that the appeal to the High Court was incompetent as the Vakalatnama granted in favour of the Government Pleader was accepted by the Assistant Government Pleader and the Memorandum of appeal was also signed and presented by him; (b) section 3 of the Bombay Act XXXI of 1956 contravened the fundamental rights under Article 26 of the Constitution of India, 1950 and so *ultra vires*, and (c) the Satsangis are not Hindus and the suit temples are not Hindu temples.

Held: It is an elementary rule of justice that no party should suffer for the mistake of the Court or its office. The High Court was therefore right in allowing the Government Pleader to accept the vakalat and sign the memo of appeal and thereby curing the irregularity in presentation of the appeal and overruling the objection thereto.

Further rule 95 of the Appellate Side Rules seems to authorise an Advocate practising on the appellate side to appear even without a vakalatnama in that behalf.

The object of section 3 of Bombay Act XXXI of 1956 and its meaning are absolutely clear; there shall be no discrimination between any classes or sections of Hindus and others. In other words, no temple shall obstruct a Harijan from entering the temple, worshipping, praying etc. in the same manner and to the same extent as any other Hindu would be permitted to do and thus it seeks to establish complete social equality between all sections of Hindus.

All that section 3 purports to do is to give the Harijans the same right to enter the temple for 'Darshan' of the deity as can be claimed by the other Hindus. It is specifically qualified by the clause that the right shall be enjoyed *in the like manner and to the like extent as any other Hindu of whatsoever section or class may do*. The argument that by enacting section 3 the traditional conventional manner of performing the actual worship by the appointed poojaris alone would be invaded and the fundamental rights under Article 26 of the Constitution contravened, is misconceived.

The issue, whether the Swaminarayan sect (Satsangis) is a religion distinct and separate from Hindu religion and consequently the temples of the said sect do not fall within section 3 of the Bombay Act XXXI of 1956 depends on what are the distinctive features of Hindu religion. *Prima facie* this seems inappropriate for judicial inquiry in a Court of law; but the Court is bound to deal with the controversy as best as it can, for deciding the civil rights claimed by the appellants under Article 26 of the Constitution. The problem posed though secular is very complex to determine. Its decision would depend upon the social, sociological, historical, religious and philosophical considerations.

After reviewing the opinions of Monier Williams, Dr. Radhakrishnan and B. G. Tilak the Court observed that it was difficult to define Hindu religion or even to describe it adequately; it does not claim one prophet; it does not worship one God; it does not subscribe to one dogma; it does not follow any one set of religious rites or performances; it does not appear to satisfy the narrow traditional features of any religion or creed; it may be described as a way of life and nothing more. But beneath the diversity in all these aspects lie certain basic concepts—acceptance of Vedas as the highest authority in religious and philosophic matters, the great 'Rita' of the universe and belief in rebirth and pre-existence.

Considering the life of Swaminarayan and the work done by him, history will not hesitate to accord him the place of honour in the galaxy of Hindu saints and religious reformers. The special features of the Swaminarayana sect—Satsangis are not born but are initiated, woman can take 'Diksha', followers of other religions also may become Satsangis by initiation—are not so special after all as even a cursory study of the growth and development of Hindu religion would show. The worship of Swaminarayan himself as God is nothing new to Hindu religion; many reformers are considered as avatars of the Supreme God; it is not inconsistent with the belief created by the teaching of Bhagawat Gita in Hindu minds.

Therefore Satsangis cannot claim to be a sect separate from Hindus and their religion different from Hindu religion. Their temples too are only Hindu Religious institutions within Article 25 (2) of the Constitution.

Appeal from the Judgment and Decree dated the 3rd October, 1958 of the Bombay High Court in First Appeal No. 107 of 1952.

Vasant J. Desai, M.L. Bhalja and A.G. Ratnaparkhi, Advocates for Appellants.

C.K. Daphtary, Attorney-General for India (Atiqur Rehman and K.L. Hathi, Advocates of M/s. Hathi & Co., with him) for Respondent No. 1.

C.K. Daphtary, Attorney-General for India and N.S. Bindra, Senior Advocate (B. R. G. K. Achar, Advocate, with them), for Respondent No. 2.

S V. Gupte, Solicitor-General of India (*B R G K Achar*, Advocate, with him) for Intervener

The Judgment of the Court was delivered by

Gajendragadkar, C J—The principal question which arises in this appeal is whether the Bombay High Court was right in holding that the Swaminarayan Sampradaya (sect) to which the appellants belong, is not a religion distinct and separate from the Hindu religion, and that the temples belonging to the said sect do come within the ambit of the provisions of the Bombay Hindu Places of Public Worship (Entry Authorisation) Act, 1956 (XXXI of 1956) (hereinafter called 'the Act'). The suit from which the present appeal arises was instituted by the appellants on the 12th January, 1948, in the Court of the Joint Civil Judge, Senior Division, Ahmedabad. Before the suit was instituted, the Bombay Harijan Temple Entry Act, 1947 (XXXV of 1947) (hereinafter called 'the former Act') had come into force on the 23rd November, 1947. The appellants are the followers of the Swaminarayan sect, and are known as Satsangis. They have filed the present suit on behalf of themselves and on behalf of the Satsangis of the Northern Diocese of the sect at Ahmedabad. They apprehended that respondent No. 1, Muldas Bhundardas Vaishya, who is the President of the Maha Gujarat Dalit Sangh at Ahmedabad, intended to assert the rights of the non-Satsangi Harijans to enter the temples of the Swaminarayan sect situated in the Northern Diocese at Ahmedabad in exercise of the legal rights conferred on them by section 3 of the former Act of 1947. Section 3 of the said Act had provided, *inter alia*, that every temple to which the Act applied shall be open to Harijans for worship in the same manner and to the same extent as other Hindus in general. To this suit the appellants had impleaded five other respondents, amongst whom was included the Province of Bombay as respondent No. 4, under the order of the Court at a later stage of the proceedings on the 18th July, 1949. In their plaint, the appellants had alleged that the Swaminarayan temple of Sree Nar Narayan Dev of Ahmedabad and all the temples subordinate thereto are not temples within the meaning of the former Act. Their case was that the Swaminarayan sect represents a distinct and separate religious sect unconnected with the Hindus and Hindu religion, and as such, their temples were outside the purview of the said Act. On the basis of this main allegation, the appellants claimed a declaration to the effect that the relevant provisions of the said Act did not apply to their temples. In the alternative, it was urged that the said Act was *ultra vires*. As a consequence of these two declarations, the appellants asked for an injunction restraining respondent No. 1 and other non-Satsangi Harijans from entering the Swaminarayan temple of the Northern Diocese of the Swaminarayan sect, and they prayed that an appropriate injunction should be issued directing respondents Nos. 2 and 3 who are the Mahants of the said temples to take steps to prevent respondent No. 1 and the other non-Satsangi Harijans from entering and worshipping in the said temples.

Pending these proceedings between the parties, the former Act was amended by Bombay Act LXXVII of 1948, and later the Constitution of India came into force on the 26th January, 1950. As a result of these events, the appellants applied for an amendment of the plaint on the 30th November, 1950, and the said application was granted by the learned trial Judge. In consequence of this amendment the appellants took the plea that their temples were not temples within the meaning of the former Act as amended by Act LXXVII of 1948, and they urged that the former Act was *ultra vires* the powers of the State of Bombay inasmuch as it was inconsistent with the Constitution and the fundamental rights guaranteed therein. It was contended by them that the Swaminarayan sect was an institution distinct and different from Hindu religion, and, therefore, the former Act as amended could not apply to or affect

the temples of the said sect. On this additional ground, the appellants supported the original claim for declarations and injunctions made by them in their plaint as it was originally filed.

This suit was resisted by respondent No. 1. It was urged on his behalf that the suit was not tenable at law, on the ground that the Court had no jurisdiction to entertain the suit under section 5 of the former Act. Respondent No. 1 disputed the appellant's right to represent the Satsangis of the Swaminarayan sect, and he averred that many Satsangis were in favour of the Harijans' entry into the Swaminarayan temples, even though such Harijans were not the followers of the Swaminarayan sect. According to him, the suit temples were temples within the meaning of the former Act as amended and that non-Satsangis Harijans had a legal right of entry and worship in the said temples. The appellants' case that the former Act was *ultra vires*, was also challenged by respondent No. 1. Respondents 2 and 3, the Mahants of the temples, filed purshis that they did not object to the appellants' claim, while respondent No. 4, the State of Bombay, and respondents 5 and 6 filed no written statements.

On these pleadings, the learned trial Judge framed several issues, and parties led voluminous documentary and oral evidence in support of their respective contentions. After considering this evidence, the learned trial Judge held that the suit was maintainable and was not barred under section 5 of the former Act. He found that the former Act was *intra vires* the legislative powers of the Bombay State and did not infringe any fundamental rights of the appellants. According to him, the Swaminarayan sect was not distinct and different from Hindu religion and as such, the suit temples were temples which were used as places of religious worship by the congregation of the Satsang which formed a section of the Hindu community. The learned trial Judge, however, came to the conclusion that it had not been established that the suit temples were used by non-Satsangi Hindus as places of religious worship by custom, usage or otherwise, and consequently, they did not come within the meaning of the word "temple" as defined by the former Act. Thus, the conclusion of the learned trial Judge on this part of the appellants' case decided the fate of the suit in their favour, though findings were recorded by the trial Judge in favour of respondent No. 1 on the other issues. In the result, the trial Court passed a decree in favour of the appellants giving them declarations and injunctions as claimed by them. This judgment was pronounced on the 24th September, 1951.

The proceedings in the trial Court were protracted and lasted for nearly three years, because interim proceedings which led to certain interlocutory orders, were contested between the parties and were taken to the High Court on two occasions before the suit was finally determined.

The decision of the trial Court on the merits was challenged by respondent No. 4 and respondent No. 1 who joined in filing the appeal. The appeal thus presented by the two respondents was heard by the High Court on the 8th March, 1957. At this hearing, two preliminary objections were raised by the appellants against the competence and maintainability of the appeal itself. It was urged that the appeal preferred by respondent No. 4 was not competent inasmuch as respondent No. 4 had no *locus standi* to prefer the appeal in view of the fact that the former Act in the validity of which respondent No. 4 was vitally interested had been held to be valid. This objection was upheld and the appeal preferred by respondent No. 4 was dismissed.

In regard to the appeal preferred by respondent No. 1, the appellants contended that the Vakalatnama filed on his behalf was invalid and as such, the appeal purported to have been preferred on his behalf was incompetent. It appears that respondent No. 1 had authorised the Government Pleader to file

an appeal on his behalf, whereas the appeal had actually been filed by Mr Dauodkar who was then the Assistant Government Pleader. The High Court rejected this objection and held that the technical irregularity on which the objection was founded could be cured by allowing the Government Pleader to sign the memorandum of appeal presented on behalf of respondent No. 1 and endorse acceptance of his Vakalatnama.

Having thus held that the appeal preferred by respondent No. 1 was competent, the High Court proceeded to consider the merits of the said appeal. It was urged before the High Court by respondent No. 1 that the declarations and injunctions granted to the appellants could not be allowed to stand in view of the Untouchability (Offences) Act, 1955 (Central Act XXII of 1955) which had come into force on the 8th May, 1955 and which had repealed the former Act. This contention did not find favour with the High Court because it took the view that the declarations and injunctions granted by the trial Court were not based on the provisions of the former Act, but were based on the view that the rights of the appellants were not affected by the said Act. The High Court observed that in dealing with the objections raised by respondent No. 1, it was unnecessary to consider whether on the merits, the view taken by the trial Court was right or not. The only point which was relevant for disposing of the said objection was to consider whether any relief had been granted to the appellants under the provisions of the former Act or not, and since the reliefs granted to the appellants were not under any of the said provisions, but were in fact based on the view that the provisions of the said Act did not apply to the temples in suit, it could not be said that the said reliefs could not survive the passing of the Untouchability (Offences) Act, 1955. The High Court, however, noticed that after the trial Court pronounced its judgments the Bombay Legislature had passed the Act (No. XXXI of 1956) and respondent No. 1 naturally relied upon the material provisions of this Act contained in section 3. Thus though the substance of the controversy between the parties remained the same, the field of the dispute was radically altered. The former Act had given place to the Act and it now became necessary to consider whether the Act was *intra vires*, and if yes whether it applied to the temples in suit. Having regard to this altered position the High Court took the view that it was necessary to issue a notice to the Advocate General under Order 27 A of the Code of Civil Procedure. Accordingly, a notice was issued to the Advocate General and the appeal was placed before the High Court on the 25th March, 1957 again. At this hearing, the High Court sent the case back to the trial Court for recording a finding on the issue 'whether the Swaminarayan temple at Ahmedabad and the temples subordinate thereto are Hindu religious institutions within the meaning of Article 25(2)(b) of the Constitution'. Both parties were allowed liberty to lead additional evidence on this issue.

After remand, the appellants did not lead any oral evidence but respondent No. 1 examined two witnesses Venihai and Keshavlal. Kesbavlal failed to appear for his final cross-examination despite adjournments, even though the trial Court had appointed a Commission to record his evidence. Nothing, however, turned upon this oral evidence. In the remand proceedings, it was not disputed before the trial Court that the temples in suit were public religious institutions. The only question which was argued before the Court was whether they could be regarded as Hindu temples or not. The appellants contended that the suit temples were meant exclusively for the followers of the Swaminarayan sect, and these followers it was urged did not profess the Hindu religion. The learned trial Judge, however, adhered to the view already expressed by his predecessor before remand that the congregation of Satsang constituted a section of the Hindu community, and so, he found that it was not open to the appellants to contend before him that the followers of the Swaminarayan sect were not a section of the Hindu community. In regard to

the nature of the temples, the learned trial Judge considered the evidence adduced on the record by both the parties and came to the conclusion that the Swaminarayan temples at Ahmedabad and the temples subordinate thereto were Hindu religious institutions within the meaning of Article 25 (2) (b) of the Constitution. This finding was recorded by the trial Judge on the 24th March, 1958.

After this finding was submitted by the learned trial Judge to the High Court, the appeal was taken up for final disposal. On this occasion, it was urged before the High Court on behalf of the appellants that the members belonging to the Swaminarayan sect did not profess the Hindu religion and, therefore, their temples could not be said to be Hindu temples. It was, however, conceded on their behalf that in case the High Court came to the conclusion that the Swaminarayan sect was not a different religion from Hinduism, the conclusion could not be resisted that the temples in suit would be Hindu religious institutions and also places of public worship within the meaning of section 2 of the Act. That is how the main question which was elaborately argued before the High Court was whether the followers of the Swaminarayan sect could be said to profess Hindu religion and be regarded as Hindus or not. It was urged by the appellants that the Satsangis who worship at the Swaminarayan temple may be Hindus for cultural and social purposes, but they are not persons professing Hindu religion, and as such they do not form a section, class or sect or denomination of Hindu religion. Broadly stated, the case for the appellants was placed before the High Court on four grounds. It was argued that Swaminarayan, the founder of the sect, considered himself as the Supreme God, and as such, the sect that believes in the divinity of Swaminarayan cannot be assimilated to the followers of Hindu religion. It was also urged that the temples in suit had been established for the worship of Swaminarayan himself and not for the worship of the traditional Hindu idols, and that again showed that the Satsangi sect was distinct and separate from Hindu religion. It was further contended that the sect propagated the ideal that worship of any god other than Swaminarayan would be a betrayal of his faith; and lastly, that the Acharyas who had been appointed by Swaminarayan adopted a procedure of "Initiation" (*diksha*) which showed that on initiation, the devotee became a Satsangi and assumed a distinct and separate character as a follower of the sect.

The High Court has carefully examined these contentions in the light of the teachings of Swaminarayan, and has come to the conclusion that it was impossible to hold that the followers of the Swaminarayan sect did not profess Hindu religion and did not form a part of the Hindu community. In coming to this conclusion, the High Court has also examined the oral evidence on which the parties relied. While considering this aspect of the matter, the High Court took into account the fact that in their plaint itself, the appellants had described themselves as Hindus and that on the occasion of previous censuses prior to 1951 when religion and community used to be indicated in distinct columns in the treatment of census data, the followers of the sect raised no objection to their being described as belonging to a sect professing Hindu religion.

Having thus rejected the main contention raised by the appellants in challenging their status as Hindus, the High Court examined the alternative argument which was urged on their behalf in regard to the constitutional validity of the Act. The argument was that the material provision of the Act was inconsistent with the fundamental rights guaranteed by Articles 25 and 26 of the Constitution and as such was invalid. The High Court did not feel impressed by this argument and felt no difficulty in rejecting it. In the result, the finding recorded by the trial Judge in favour of the appellants in regard to their status and character as followers of the Swaminarayan sect was reversed; inevitably the decree passed by the trial Judge was vacated and the suit instituted by the appellants was ordered

to be dismissed. It is against this decree that the present appeal has been brought to this Court on a certificate issued by the High Court.

Before dealing with the principal point which has been posed at the commencement of this judgment, it is necessary to dispose of two minor contentions raised by Mr V J Desai who appeared for the appellants before us. Mr Desai contends that the High Court was in error in treating as competent the appeal preferred by respondent No 1. His case is that since the said appeal had not been duly and validly filed by an Advocate authorised by respondent No 1 in that behalf, the High Court should have dismissed the said appeal as being incompetent. It will be recalled that the appeal memo as well as the Vakalatnama filed along with it were signed by Mr Daundkar who was then the Assistant Government Pleader, and the argument is that since the Vakalatnama had been signed by respondent No 1 in favour of the Government Pleader, its acceptance by the Assistant Government Pleader was invalid and that rendered the presentation of the appeal by the Assistant Government Pleader on behalf of respondent No 1 incompetent. Order 41, rule 1 of the Code of Civil Procedure requires *inter alia* that every appeal shall be preferred in the form of a memorandum signed by the appellant or his Pleader and presented to the Court or to such officer as it appoints in that behalf. Order 3, rule 4 of the Code relates to the appointment of a Pleader. Sub-rule (1) of the said rule provides, *inter alia* that no Pleader shall act for any person in any Court unless he has been appointed for the purpose by such person by a document in writing signed by such person. Sub-rule (2) adds that every such appointment shall be filed in Court and shall be deemed to be in force until determined with the leave of the Court in the manner indicated by it. Technically it may be conceded that the memorandum of appeal presented by Mr Daundkar suffered from the infirmity that respondent No 1 had signed his Vakalatnama in favour of the Government Pleader and Mr Daundkar could not have accepted it though he was working in the Government Pleader's office as an Assistant Government Pleader. Even so the said memo was accepted by the office of the Registrar of the Appellate Side of the High Court because the Registry regarded the presentation of the appeal to be proper, the appeal was in due course admitted and it finally came up for hearing before the High Court. The failure of the Registry to invite the attention of the Assistant Government Pleader to the irregularity committed in the presentation of the said appeal cannot be said to be irrelevant in dealing with the validity of the contention raised by the appellants. If the Registry had returned the appeal to Mr Daundkar as irregularly presented, the irregularity could have been immediately corrected and the Government Pleader would have signed both the memo of appeal and the Vakalatnama. It is an elementary rule of justice that no party should suffer for the mistake of the Court or its office. Besides, one of the rules framed by the High Court on its Appellate Side—rule 95 seems to authorise an Advocate practising on the Appellate Side of the High Court to appear even without initially filing a Vakalatnama in that behalf. If an appeal is presented by an Advocate without a Vakalatnama duly signed by the appellant, he is required to produce the Vakalatnama authorising him to present the appeal or to file a statement signed by himself that such Vakalatnama has been duly signed by the appellant in time. In this case the Vakalatnama had evidently been signed by respondent No 1 in favour of the Government Pleader in time, and so, the High Court was plainly right in allowing the Government Pleader to sign the memo of appeal and the Vakalatnama in order to remove the irregularity committed in the presentation of the appeal. We do not think that Mr Desai is justified in contending that the High Court was in error in overruling the objection raised by the appellants before it that the appeal preferred by respondent No 1 was incompetent.

The next contention which Mr Desai has urged before us is that section 3 of the Act is *ultra vires*. Before dealing with this contention, it is relevant to refer

to the series of Acts which have been passed by the Bombay Legislature with a view to remove the disabilities from which the Harijans suffered. A brief resume of the legislative history on this topic would be of interest not only in dealing with the contention raised by Mr. Desai about the invalidity of section 3, but in appreciating the sustained and deliberate efforts which the Legislature has been making to meet the challenge of untouchability.

In 1938, the Bombay Harijans Temple Worship (Removal of Disabilities) Act (No. XI of 1938) was passed. This Act represented a somewhat cautious measure adopted by the Bombay Legislature to deal with the problem of untouchability. It made an effort to feel the pulse of the Hindu community in general and to watch its reactions to the efforts which the Legislature may make, to break through the citadel of orthodoxy and conquer traditional prejudices against Harijans. This Act did not purport to create any statutory right which Harijans could enforce by claiming an entry into Hindu temples; it only purported to make some enabling provisions which would encourage the progressive elements in the Hindu community to help the Legislature in combating the evil of untouchability. The basic scheme of this Act was contained in sections 3, 4 and 5. The substance of the provisions contained in these sections was that in regard to temples, the trustees could by a majority, make a declaration that their temples would be open to Harijans notwithstanding the terms of instrument of trust, the terms of dedication or decree or order of any competent Court or any custom, usage or law for the time being in force to the contrary. Section 3 dealt with making of these declarations. Section 4 required the publication of the said declarations in the manner indicated by it; and section 5 authorised persons interested in the temple in respect of which a declaration had been published under section 4 to apply to the Court to set aside the said declaration. If such an application is received, the jurisdiction has been conferred on the Court to deal with the said application. Section 5 (5) provides that if the Court is satisfied that the applicant was a person interested in the temple and that the impugned declaration was shown not to have been validly made, it shall set aside the declaration; if the Court is not so satisfied, it shall dismiss the application. Section 5 (7) provides that the decision of the Court under sub-section (5) shall be final and conclusive for the purposes of this Act. The Court specially empowered to deal with these applications means the Court of a District Judge and includes the High Court in exercise of its Ordinary Original Civil Jurisdiction. The jurisdiction thus conferred on the Court is exclusive with the result that section 6 bars any Civil Court to entertain any complaint in respect of the matters decided by the Court of exclusive jurisdiction purporting to act under the provisions of this Act. This Act can be regarded as the first step taken by the Bombay Legislature to remove the disability of untouchability from which Harijans had been suffering. The object of this Act obviously was to invite co-operation from the majority of trustees in the respective Hindu temples in making it possible for the Harijans to enter the said temples and offer prayers in them.

Then followed Act No. X of 1947 which was passed by the Bombay Legislature to provide for the removal of social disabilities of Harijans. This Act was passed with the object of removing the several disabilities from which Harijans suffered in regard to the enjoyment of social, secular amenities of life. Section 3 of this Act declared that notwithstanding anything contained in any instrument or any law, custom or usage to the contrary, no Harijan shall merely on the ground that he is a Harijan, be ineligible for office under any authority constituted under any law or be prevented from enjoying the amenities described by clauses (b) (i) to (vii). The other sections of this Act made suitable provisions to enforce the statutory right conferred on the Harijans by section 3.

Next we come to the former Act No. XXXV of 1947. We have already seen that when the present plaint was filed by the appellants, they challenged the right of

the non-Satsangi Harijans to enter the temples under section 3 of this Act and alternatively they challenged its validity. This Act was passed to entitle the Harijans to enter and perform worship in the temples in the Province of Bombay. Section 2 (a) of this Act defines a Harijan as meaning a member of a caste race or tribe deemed to be a Scheduled caste under the Government of India (Scheduled Castes) Order 1936. Section 2 (b) defines 'Hindus' as including Jains. Section 2 (c) defines temple as meaning a place by whatever designation known which is used as of right by dedicated to or for the benefit of the Hindus in general other than Harijans as a place of public religious worship and section 2 (d) defines worship as including attendance at a temple for the purpose of darshan of a deity or deities installed in or within the precincts thereof. Section 3 which contains the main operative provision of this Act reads thus —

Notwithstanding anything contained in the terms of any instruments of trust the terms of dedication the terms of a sanad or a decree or order of a competent Court or any custom usage or law for the time being in force to the contrary every temple shall be open to Harijans for worship in the same manner and to the same extent as to any member of the Hindu community or any section thereof and the Harijans shall be entitled to bathe in or use the waters of any sacred tank well spring or water course in the same manner and to the same extent as any member of the Hindu Community or any section thereof.

Section 4 provides for penalties. Section 5 excludes the jurisdiction of Civil Courts to deal with any suit or proceeding if it involves a claim which if granted would in any way be inconsistent with the provisions of this Act. Section 6 authorises the police officer not below the rank of Sub-Inspector to arrest without warrant any person who is reasonably suspected of having committed an offence punishable under this Act.

Section 2 (c) of the former Act was later amended by Act LXXVII of 1948. The definition of the word 'temple' which was thus inserted by the amending Act reads thus:

'Temple' means a place by whatever name known and to whomsoever belonging which is used as a place of religious worship by custom usage or otherwise by the members of the Hindu community or any section thereof and includes all land appurtenant thereto and subsidiary shrines attached to any such place.

It will be recalled that after this amended definition was introduced in the former Act the appellants asked for and obtained permission to amend their plaint and it is the claim made in the amended plaint by relation to the new definition of the word temple that parties led evidence before the trial Court. This Act shows that the Bombay Legislature took the next step in 1947 and made a positive contribution to the satisfactory solution of the problem of untouchability. It conferred on the Harijans a right to enter temples to which the Act applied and to offer worship in them and we have already seen that worship includes attendance at the temple for the purpose of darshan of a deity or deities in the precincts thereof.

On the 26th January 1950 the Constitution of India came into force and Article 17 of the Constitution categorically provided that untouchability is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of Untouchability shall be an offence punishable in accordance with law. In a sense the fundamental right declared by Article 17 afforded full justification for the policy underlying the provisions of the former Act.

After the Constitution was thus adopted the Central Legislature passed the Untouchability (Offences) Act 1955 (No XXII of 1955). This Act makes a comprehensive provision for giving effect to the solemn declaration made by Article 17 of the Constitution. It extends not only to places of public worship but to hotels places of public entertainment, and shops as defined by section 2 (a) (b) (c) and (e). Section 2 (d) of this Act defines a place of public worship as meaning a place by whatever name known which is used as a place of public religious worship or

which is dedicated generally to, or is used generally by, persons professing any religion or belonging to any religious denomination or any section thereof, for the performance of any religious service, or for offering prayers therein; and includes all lands and subsidiary shrines appurtenant or attached to any such place. The sweep of the definitions prescribed by section 2 indicates the very broad field of socio-religious activities over which the mandatory provisions of this Act are intended to operate. It is not necessary for our purpose to refer to the provisions of this Act in detail. It is enough to state that sections 3 to 7 of this Act provide different punishments for contravention of the constitutional guarantee for the removal of untouchability in any shape or form. Having thus prescribed a comprehensive statutory code for the removal of untouchability, section 17 of this Act repealed twenty one State Acts which had been passed by the several State Legislatures with the same object. Amongst the Acts thus repealed are Bombay Acts X of 1947 and XXXV of 1947.

That takes us to the Act—No. XXXI of 1956—with which we are directly concerned in the present appeal. After the Central Act XXII of 1955 was passed and the relevant Bombay Statutes of 1947 had been repealed by section 17 of that Act, the Bombay Legislature passed the Act. The Act is intended to make better provision for the throwing open of places of public worship to all classes and sections of Hindus. It is a short Act containing 8 sections. Section 2 which is the definition section is very important; it reads thus:—

“2. In this Act, unless the context otherwise requires,—

(a) ‘place of public worship’ means a place, whether a temple or by any other name called, to whomsoever belonging which is dedicated to, or for the benefit of, or is used generally by, Hindus, Jains, Sikhs or Buddhists or any section or class thereof, for the performance of any religious service or for offering prayers therein; and includes all lands and subsidiary shrines appurtenant or attached to any such place, and also any sacred tanks, wells, springs and water-courses the waters of which are worshipped, or are used for bathing or for worship.

(b) ‘section’ or ‘class’ of Hindus includes any division, sub-division, caste, sub-caste, sect or denomination whatsoever of Hindus.”

Section 3 is the operative provision of the Act and it is necessary to read it also :

“3. Notwithstanding any custom, usage or law for the time being in force, or the decree or order of a Court, or anything contained in any instrument, to the contrary, every place of public worship which is open to Hindus generally, or to any section or class thereof, shall be open to all sections and classes of Hindus; and no Hindu of whatsoever section or class, shall in any manner be prevented, obstructed or discouraged from entering such place of public worship, or from worshipping or offering prayers thereat, or performing any religious service therein, in the like manner and to the like extent as any other Hindu of whatsoever section or class may so enter, worship, pray or perform.”

Section 4 (1) provides for penalties for the contravention of the provisions of the Act and section 4 (2) lays down that nothing in this section shall be taken to relate to offences relating to the practice of “untouchability”. Section 5 deals with the abetment of offences prescribed by section 4 (1). Section 6 provides *inter alia*, that no Civil Court shall pass any decree or order which in substance would in any way be contrary to the provisions of this Act. Section 7 makes offences prescribed by section 4 (1) cognisable, and compoundable with the permission of the Court; and section 8 provides that the provisions of this Act shall not be taken to be in derogation of any of the provisions of the Untouchability (Offences) Act (XXII of 1955) or any other law for the time being in force relating to any of the matters dealt with in this Act. That in brief is the outline of the history of the Legislative efforts to combat and meet the problem of untouchability and to help Harijans to secure the full enjoyment of all rights guaranteed to them by Article 17 of the Constitution.

Let us now revert to Mr. Desai's argument that section 3 of the Act is invalid inasmuch as it contravenes the appellants' fundamental rights guaranteed by

Article 26 of the Constitution Section 3 throws open the Hindu temples to all classes and sections of Hindus and it puts an end to any effort to prevent or obstruct or discourage Harijans from entering a place of public worship or from worshipping or offering prayers thereat, or performing any religious service therein, in the like manner and to the like extent as any other Hindu of whatsoever section or class may so enter, worship, pray or perform. The object of the section and its meaning are absolutely clear. In the matter of entering the Hindu temple or worshipping or praying or performing any religious service therein, there shall be no discrimination between any classes or sections of Hindus and others. In other words no Hindu temple shall obstruct a Harijan from entering the temple or worshipping in the temple or praying in it or performing any religious service therein in the same manner and to the same extent as any other Hindu would be permitted to do.

Mr Desai contends that in the temples in suit, even the Satsangi Hindus are not permitted to enter the innermost sacred part of the temple where the idols are installed. It is only the Poojaris who are authorised to enter the said sacred portion of the temples and do the actual worship of the idols by touching the idols for the purpose of giving a bath to the idols, dressing the idols, offering garlands to the idols and doing all other ceremonial rites prescribed by the Swaminarayan tradition and convention, and his grievance is that the words used in section 3 are so wide that even this part of actual worship of the idols which is reserved for the Poojaris and specially authorised class of worshippers, may be claimed by respondent No 1 and his followers, and in so far as such a claim appears to be justified by section 3 of the Act, it contravenes the provisions of Article 26 (b) of the Constitution. Article 26 (b) provides that subject to public order, morality and health, every religious denomination or any section thereof shall have the right to manage its own affairs in matters of religion, and so, the contention is that the traditional conventional manner of performing the actual worship of the idols would be invaded if the broad words of section 3 are construed to confer on non Satsangi Harijans a right to enter the innermost sanctuary of the temples and seek to perform that part of worship which even Satsangi Hindus are not permitted to do.

In our opinion, this contention is misconceived. In the first place it is significant that no such plea was made or could have been made in the plaint, because section 3 of the former Act which was initially challenged by the appellants had expressly defined "worship" as including a right to attend a temple for the purpose of darshan of a deity or deities in or within the precincts thereof, and the cause of action set out by the appellants in their plaint was that they apprehended that respondent No 1 and his followers would enter the temple and seek to obtain darshan of the deity installed in it. Therefore, it would not be legitimate for the appellants to raise this new contention for the first time when they find that the words used in section 3 of the Act are somewhat wider than the words used in the corresponding section of the former Act.

Besides, on the merits, we do not think that by enacting section 3, the Bombay Legislature intended to invade the traditional and conventional manner in which the act of actual worship of the deity is allowed to be performed only by the authorised Poojaris of the temple and by no other devotee entering the temple for darshan. In many Hindu temples, the act of actual worship is entrusted to the authorised Poojaris and all the devotees are allowed to enter the temple up to a limit beyond which entry is barred to them, the innermost portion of the temple being reserved only for the authorised Poojaris of the temple. If that is so, then all that section 3 purports to do is to give the Harijans the same right to enter the temple for 'darshan' of the deity as can be claimed by the other Hindus. It would be noticed that the right to enter the temple, to worship in the temple, to pray in it or to perform any religious service therein which has been conferred by section 3 is specifically conferred by the clause that the said right will be enjoyed

in the like manner and to the like extent as any other Hindu of whatsoever section or class may do. The main object of the section is to establish complete social equality between all sections of the Hindus in the matter of worship specified by section 3 ; and so, the apprehension on which Mr. Desai's argument is based must be held to be misconceived. We are, therefore, satisfied that there is no substance in the contention that section 3 of the Act is *ultra vires*.

That takes us to the main controversy between the parties. Are the appellants justified in contending that the Swaminarayan sect is a religion distinct and separate from the Hindu religion, and consequently, the temples belonging to the said sect do not fall within the ambit of section 3 of the Act ? In attempting to answer this question, we must inevitably enquire what are the distinctive features of Hindu religion ? The consideration of this question, *prima facie*, appears to be somewhat inappropriate within the limits of judicial enquiry in a Court of law. It is true that the appellants seek for reliefs in the present litigation on the ground that their civil rights to manage their temples according to their religious tenets are contravened ; and so, the Court is bound to deal with the controversy as best as it can. The issue raised between the parties is undoubtedly justiciable and has to be considered as such ; but in doing so, we cannot ignore the fact that the problem posed by the issue, though secular in character, is very complex to determine ; its decision would depend on social, sociological, historical, religious and philosophical considerations ; and when it is remembered that the development and growth of Hindu religion spreads over a large period of nearly 4,000 years, the complexity of the problem would at once become patent.

Who are Hindus and what are the broad features of Hindu religion, that must be the first part of our enquiry in dealing with the present controversy between the parties. The historical and etymological genesis of the word "Hindu" has given rise to a controversy amongst indologists ; but the view generally accepted by scholars appears to be that the word "Hindu" is derived from the river Sindhu otherwise known as Indus which flows from the Punjab. "That part of the great Aryan race", says Monier Williams, "which immigrated from Central Asia, through the mountain passes into India, settled first in the districts near the river Sindhu (now called the Indus). The Persians pronounced this word Hindu and named their Aryan brethren Hindus. The Greeks, who probably gained their first ideas of India from the Persians, dropped the hard aspirate, and called the Hindus 'Indoi'¹.

The Encyclopaedia of Religion and Ethics, Vol. VI, has described "Hinduism" as the title applied to that form of religion which prevails among the vast majority of the present population of the Indian Empire (p. 686). As Dr. Radhakrishnan has observed :

'The Hindu civilization is so called, since its original founders or earliest followers occupied the territory drained by the Sindhu (the Indus) river system corresponding to the North-West Frontier Province and the Punjab. This is recorded in the Rig Veda, the oldest of the Vedas, the Hindu scriptures which give their name to this period of Indian history. The people on the Indian side of the Sindhu were called Hindu by the Persian and the later western invaders.'²

That is the genesis of the word "Hindu".

When we think of the Hindu religion, we find it difficult, if not impossible, to define Hindu religion or even adequately describe it. Unlike other religions in the world, the Hindu religion does not claim any one prophet ; it does not worship any one God ; it does not subscribe to any one dogma ; it does not believe in any one philosophic concept ; it does not follow any one set of religious rites or performances ; in fact, it does not appear to satisfy the narrow traditional features of any religion or creed. It may broadly be described as a way of life and nothing more.

1. "Hinduism by Monier Williams", p. 1.
2. "The Hindu View of Life" by Dr. Radhakrishnan, p. 12.

Confronted by this difficulty, Dr Radhakrishnan realised that "to many Hinduism seems to be a name without any content. Is it a museum of beliefs, a medley of rites, or a mere map, a geographical expression."¹ Having posed these questions which disturbed foreigners when they think of Hinduism, Dr Radhakrishnan has explained how Hinduism has steadily absorbed the customs and ideas of peoples with whom it has come into contact and has thus been able to maintain its supremacy and its youth. The term 'Hindu', according to Dr Radhakrishnan, had originally a territorial and not a credal significance. It implied residence in a well-defined geographical area. Aboriginal tribes, savage and half-civilized people, the cultured Dravidians and the Vedic Aryans were all Hindus as they were the sons of the same mother. The Hindu thinkers reckoned with the striking fact that the men and women dwelling in India belonged to different communities, worshipped different gods, and practised different rites (Kurma Purana)²

Monier Williams has observed that

"it must be borne in mind that Hinduism is far more than a mere form of theism resting on Brahmanism. It presents for our investigation a complex congeries of creeds and doctrines which in its gradual accumulation may be compared to the gathering together of the mighty volume of the Ganges, swollen by a continual influx of tributary rivers and rivulets, spreading itself over an ever increasing area of country, and finally resolving itself into an intricate delta of tortuous streams and jungly marshes. The Hindu religion is a reflection of the composite character of the Hindus, who are not one people but many. It is based on the idea of universal receptivity. It has ever aimed at accommodating itself to circumstances, and has carried on the process of adaptation through more than three thousand years. It has first borne with and then so to speak, swallowed, digested, and assimilated something from all creeds"³

We have already indicated that the usual tests which can be applied in relation to any recognised religion or religious creed in the world turn out to be inadequate in dealing with the problem of Hindu religion. Normally, any recognized religion or religious creed subscribes to a body of set philosophic concepts and theological beliefs. Does this test apply to the Hindu religion? In answering this question, we would base ourselves mainly on the exposition of the problem by Dr Radhakrishnan in his work on Indian Philosophy⁴. Unlike other countries, India can claim that philosophy in ancient India was not an auxiliary to any other science or art, but always held a prominent position of independence. The Mandaka Upanishad speaks of Brahma-vidya or the science of the eternal as the basis of all sciences, 'sarva vidya pratishta'. According to Kautilya, "Philosophy" is the lamp of all the sciences, the means of performing all the works, and the support of all the duties. "In all the fleeting centuries of history" says Dr. Radhakrishnan.

"in all the vicissitudes through which India has passed, a certain marked identity is visible. It has held fast to certain psychological traits which constitute its special heritage and they will be the characteristic marks of the Indian people so long as they are privileged to have a separate existence

The history of Indian thought emphatically brings out the fact that the development of Hindu religion has always been inspired by an endless quest of the mind for truth based on the consciousness that truth has many facets. Truth is one but wise men describe it differently⁵. The Indian mind has, consistently through the ages, been exercised over the problem of the nature of godhead the problem that faces the spirit at the end of life, and the inter-relation between the individual and the universal soul

"If we can abstract from the variety of opinion" says Dr Radhakrishnan "and observe the general spirit of Indian thought, we shall find that it has a disposition to interpret life and nature

1 "The Hindu View of Life" by Dr Radhakrishnan, p. 11.

2 do do p. 12

3 'Religious Thought and Life in India' by Monier Williams p. 57

4 "Indian Philosophy" by Dr Radhakrishnan, Vol. I, pp. 22-23

5 एक सद्भिर्मा बहुधा वदन्ति

in the way of monistic idealism, though this tendency is so plastic, living and manifold that it takes many forms and expresses itself in even mutually hostile teachings".¹

The monistic idealism which can be said to be the general distinguishing feature of Hindu Philosophy has been expressed in four different forms : (1) Non-dualism or Advaitism; (2) Pure monism; (3) Modified monism; and (4) Implicit monism. It is remarkable that these different forms of monistic idealism purport to derive support from the same Vedic and Upanishadic texts. Shankar, Ramanuja, Vallabha and Madhva² all based their philosophic concepts on what they regarded to be the synthesis between the Upanishads, the Brahmasutras and the Bhagvad Gita. Though philosophic concepts and principles evolved by different Hindu thinkers and philosophers varied in many ways and even appeared to conflict with each other in some particulars, they all had reverence for the past and accepted the Vedas as the sole foundation of the Hindu philosophy. Naturally enough, it was realised by Hindu religion from the very beginning of its career that truth was many-sided and different views contained different aspects of truth which no one could fully express. This knowledge inevitably bred a spirit of tolerance and willingness to understand and appreciate the opponent's point of view. That is how "the several views set forth in India in regard to the vital philosophic concepts are considered to be the branches of the self-same tree. The short cuts and blind alleys are somehow reconciled with the main road of advance to the truth".² When we consider this broad sweep of the Hindu philosophic concepts, it would be realised that under Hindu philosophy, there is no scope for ex-communicating any notion or principle as heretical and rejecting it as such.

Max Muller who was a great oriental scholar of his time was impressed by this comprehensive and all-pervasive aspect of the sweep of Hindu philosophy. Referring to the six systems known to Hindu philosophy, Max Muller observed :

"The longer I have studied the various systems, the more have I become impressed with the truth of the view taken by Vijnanabiksu and others that there is behind the variety of the six systems a common fund of what may be called national or popular philosophy, a large manasa (fate) of philosophical thought and language far away in the distant North and in the distant past, from which each thinker was allowed to draw for his own purposes".³

Beneath the diversity of philosophic thoughts, concepts and ideas expressed by Hindu philosophers who started different philosophic schools, lie certain broad concepts which can be treated as basic. The first amongst these basic concepts is the acceptance of the Veda as the highest authority in religious and philosophic matters. This concept necessarily implies that all the systems claim to have drawn their principles from a common reservoir of thought enshrined in the Veda. The Hindu teachers were thus obliged to use the heritage they received from the past in order to make their views readily understood. The other basic concept which is common to the six systems of Hindu philosophy is that

"all of them accept the view of the great world rhythm. Vast periods of creation, maintenance and dissolution follow each other in endless succession. This theory is not inconsistent with belief in progress; for it is not a question of the movement of the world reaching its goal times without number, and being again forced back to its starting-point. It means that the race of man enters upon and retravels its ascending path of realization. This interminable succession of world ages has no beginning".⁴

It may also be said that all the systems of Hindu philosophy believe in rebirth and pre-existence.

1. "Indian Philosophy" by Dr. Radhakrishnan, Vol. I, p. 32.
2. do. p. 42.
3. "Six Systems of Indian Philosophy" by Max Muller, p. xvii.
4. "Indian Philosophy" by Dr. Radhakrishnan, Vol. II, p. 26.

Our life is a step on a road the direction and goal of which are lost in the infinite. On this road death is never an end or an obstacle but at most the beginning of new steps.¹

Thus it is clear that unlike other religions and religious creeds, Hindu religion is not tied to any definite set of philosophic concepts as such.

Do the Hindus worship at their temples the same set or number of gods? That is another question which can be asked in this connection, and the answer to this question again has to be in the negative. Indeed, there are certain sections of the Hindu community which do not believe in the worship of idols, and as regards those sections of the Hindu community which believe in the worship of idols their idols differ from community to community and it cannot be said that one definite idol or a definite number of idols are worshipped by all the Hindus in general. In the Hindu Pantheon the first gods that were worshipped in Vedic times were mainly Indra, Varuna, Vayu and Agni. Later, Brahma, Vishnu and Mahesh came to be worshipped. In course of time, Rama and Krishna secured a place of pride in the Hindu Pantheon, and gradually as different philosophic concepts held sway in different sects and in different sections of the Hindu community, a large number of gods were added with the result that today, the Hindu Pantheon presents the spectacle of a very large number of gods who are worshipped by different sections of the Hindus.

The development of Hindu religion and philosophy shows that from time to time saints and religious reformers attempted to remove from the Hindu thought and practices elements of corruption and superstition and that led to formation of different sects. Buddha started Buddhism, Mahavir founded Jainism, Basava became the founder of Lingayat religion, Dhyaneswar and Tukaram initiated the Varkari cult, Guru Nank inspired Sikhism, Dayananda founded Arya Samaj and Chaitanya began Bhakti cult, and as a result of the teachings of Ramakrishna and Vivekananda Hindu religion flowered into its most attractive, progressive and dynamic form. If we study the teachings of these saints and religious reformers, we would notice an amount of divergence in their respective view, but underneath that divergence, there is a kind of subtle, indescribable unity which keeps them within the sweep of the broad and progressive Hindu religion.

There are some remarkable features of the teachings of these saints and religious reformers. All of them revolted against the dominance of rituals and the power of the priestly class with which it came to be associated, and all of them proclaimed their teachings not in Sanskrit which was the monopoly of the priestly class but in languages spoken by the ordinary mass of people in their respective regions.

Whilst we are dealing with this broad and comprehensive aspect of Hindu religion, it may be permissible to enquire what according to this religion is the ultimate goal of humanity? It is the release and freedom from the unending cycle of births and rebirths, Moksha or Nirvana which is the ultimate aim of Hindu religion and philosophy, represents the state of absolute absorption and assimilation of the individual soul with the infinite. What are the means to attain this end? On this vital issue, there is great divergence of views, some emphasise the importance of Gyan or knowledge, while others extol the virtues of Bhakti or devotion and yet others insist upon the paramount importance of performance of duties with a heart full of devotion and mind inspired by true knowledge. In this sphere again there is diversity of opinion, though all are agreed about the ultimate goal. Therefore it would be inappropriate to apply the traditional tests in determining the extent of the jurisdiction of Hindu religion. It can be safely described as a way of life based on certain basic concepts to which we have already referred.

Tilak faced this complex and difficult problem of defining or at least describing adequately Hindu religion and he evolved a working formula which may be regarded as fairly adequate and satisfactory. Said Tilak:

"Acceptance of the Vedas with reverence; recognition of the fact that the means or ways to salvation are diverse; and realisation of the truth that the number of gods to be worshipped is large, that indeed is the distinguishing feature of Hindu religion".

This definition brings out succinctly the broad distinctive features of Hindu religion. It is somewhat remarkable that this broad sweep of Hindu religion has been eloquently described by Toynbee. Says Toynbee:

"When we pass from the plane of social practice to the plane of intellectual outlook, Hinduism too comes out well by comparison with the religions and ideologies of the South-West Asian group. In contrast to these Hinduism has the same outlook as the pre-Christian and pre-Muslim religions and philosophies of the Western half of the old world. Like them, Hinduism takes it for granted that there is more than one valid approach to truth and to salvation and that these different approaches are not only compatible with each other, but are complementary".

The Constitution-makers were fully conscious of this broad and comprehensive character of Hindu religion; and so, while guaranteeing the fundamental right to freedom of religion, *Explanation II* to Article 25 has made it clear that in sub-clause (b) of clause (2), the reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jaina or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly.

Consistently with this constitutional provision, the Hindu Marriage Act, 1955; the Hindu Succession Act, 1956; the Hindu Minority and Guardianship Act, 1956; and the Hindu Adoptions and Maintenance Act, 1956 have extended the application of these Acts to all persons who can be regarded as Hindus in this broad and comprehensive sense. Section 2 of the Hindu Marriage Act, for instance, provides that this Act applies—

(a) to any person who is a Hindu by religion in any of its forms or developments, including a Virashaiva, a Lingayat or a follower of the Brahmo, Prarthana or Arya Samaj.

(b) to any person who is a Buddhist, Jaina, or Sikh by religion, and

(c) to any other person domiciled in the territories to which this Act extends who is not a Muslim, Christian, Parsi or Jew by religion, unless it is proved that any such person would not have been governed by the Hindu law or by any custom or usage as part of that law in respect of any of the matters dealt with herein if this Act had not been passed.

The same provision is made in the other three Acts to which we have just referred.

It is in the light of this position that we must now proceed to consider whether the philosophy and theology of Swaminarayan show that the school of Swaminarayan constitutes a distinct and separate religion which is not a part of Hindu religion. Do the followers of the said sect fall outside the Hindu brotherhood, religion. That is the crux of the problem which we have to face in the present appeal. In deciding this question, it is necessary to consider broadly the philosophic and theological tenets of Swaminarayan and the characteristics which marked the followers of Swaminarayan who are otherwise known as Satsangis.

In dealing with this aspect of the problem, it would be safe to rely upon the data furnished by Monier Williams in his book "Religious Thought and Life in India" (1883). It is hardly necessary to emphasise that Monier Williams played a very important role in explaining the religious thought and life in India to the English-speaking world outside India.

"Having been a student of Indian sacred literature for more than forty years," observed Monier Williams "and having twice travelled over every part of India, from Bombay to Calcutta, from Cashmere to Ceylon, I may possibly hope to make a dry subject fairly attractive without

1. प्रामाण्यवृद्धिर्वेदेषु साधनानामनेकता ।

उपास्यानामनियमश्चैतद्धर्मस्य लक्षणम् ।

B. G. Tilak's "Gitarahasya." by Toynbee, p. 48-49.

2. "The Present day Experiment in Western Civilisation"

any serious sacrifice of scientific accuracy, while at the same time it will be my earnest endeavour to hold the scales impartially between antagonistic religious systems and as far as possible to do justice to the amount of truth that each may contain (p 1)

It is a remarkable tribute to the scholarship of Monier Williams and of his devotion to the mission which he had undertaken that though his book was written as early as 1883, it is still regarded as a valuable source of information in dealing with problems connected with the religious thought and life in India

Let us then refer briefly to the life story of Swaminarayan, for that would help us to understand and appreciate the significance of his philosophic and religious teachings. The original name of Swaminarayan was Sahajananda. By birth he was a high caste Brahman. He was born at Chapai, a village 120 miles to the north west of Lucknow, about the year 1780. He was born to Vaishnava parents, but early in his career he was "disgusted with the manner of life of the so-called followers of Vallabhacharya, whose precepts and practice were utterly at variance and especially with the licentious habits of the Bombay Maharajas". He was then determined to denounce these irregularities and expose the vices that had crept into the lives of the Bombay Maharajas. Swaminarayan was a celibate and he "lived an ascetical, yet withal a large hearted and philanthropic, life" and he showed a great aptitude for learning. In 1800, he left his home and placed himself under the protection of the Chief Guru, named Ramananda Swami at a village within the jurisdiction of the Sunagarh Nawab. When Ramananda Swami removed to Ahmedabad in 1804, Sahajananda followed him. Soon Sahajananda collected around him a little band of disciples, which rapidly grew "into an army of devoted adherents". That naturally provoked the wrath of the orthodox Brahmans and magnates of Ahmedabad who began to persecute him. That drove Sahajananda to Jetalpur, 12 miles south of Ahmedabad, which became the focus of a great religious gathering. Thousands of people were attracted by this young religious teacher who now took the name of Swaminarayan. Swaminarayan then retired to the secluded village of Wartal, where he erected a temple to Narayana (otherwise Krishna or Vishnu, as the Supreme Being) associated with the Goddess Lakshmi. From this central scene of his religious activities, Swaminarayan mounted a strong crusade against the licentious habits of the gurus of the Vallabhacharya sect. His watchword was 'devotion to Krishna with observance of duty and purity of life'. The two principal temples of the Swaminarayan sect are at Wartal, which is about four miles to the west of the Baroda Railway Station, and at Ahmedabad.

In about 1826-27, a formal constitution of the sect appears to have been prepared, it is known as the 'Lekh' or the document for the apportionment of territory (Deshvibhaga Lekh). By this document, Swaminarayan divided India into two parts by a notional line running from Calcutta to Navanagar and established dioceses, the northern one with the temple of Nar Narayan at Ahmedabad, and the southern one which included the temple of Lakshminarayan at Wartal. To preside over these two dioceses Swaminarayan adopted his two nephews Ayodhyaprasad and Raghuvir respectively. Subordinate to these Gadis and the principal temples two score large temples and over a thousand smaller temples scattered all over the country came to be built in due course.

The constitution of the Swaminarayan sect and its tenets and practices are collected in four different scriptures of the faith, viz, (1) the "Lekh" to which we have just referred, (2) the "Shikshapatri" which was originally written by Swaminarayan himself in about 1826 A. D., the original manuscript does not appear to be available, but the Shikshapatri was subsequently rendered into Sanskrit verses by Shatanandswami under the directions of Swaminarayan himself. This Sanskrit translation is treated by the followers of Swaminarayan as authentic. This book was later translated into Gujarati by another disciple named Nityanand. This Shikshapatri is held in high reverence by the followers of the faith as a prayer book and it contains summary of Swaminarayan's instruc-

tions and principles which have to be followed by his disciples in their lives; (3) the "Satsangiwan" which consists of five parts and written in Sanskrit by Shatanand during the lifetime of Swaminarayan. This work gives an account of the life and teachings of Swaminarayan. It appears to have been completed in about 1829. Shikshapatri has been bodily incorporated in this work; (4) the "Vachanamrit" which is a collection of Swaminarayan's sermons in Gujarati. This appears to have been prepared between 1822 and 1830. Swaminarayan died in 1830.

It is necessary at this stage to indicate broadly the principles which Swaminarayan preached and which he wanted his followers to adopt in life. These principles have been succinctly summarised by Monier Williams. It is interesting to recall that before Monier Williams wrote his Chapter on Swaminarayan sect, he visited the Wartal temple in company with the Collector of Kaira on the day of the Purnima, or full moon of the month of Kartik which is regarded as the most popular festival of the whole year by the Swaminarayan sect. On the occasion of this visit, Monier Williams had long discussions with the followers of Swaminarayan and he did his best to ascertain the way Swaminarayan's principles were preached and taught and the way they were practised by the followers of the sect. We will now briefly reproduce some of the principles enunciated by Swaminarayan.

"The killing of any animal for the purpose of sacrifice to the gods is forbidden by me. Abstaining from injury is the highest of all duties. No flesh meat must ever be eaten, no spirituous or vinous liquor must ever be drunk, not even as medicine. My male followers should make the vertical mark (emblematical of the footprint of Vishnu or Krishna) with the round spot inside it (symbolical of Lakshmi) on their foreheads. Their wives should only make the circular mark with red powder or saffron. Those who are initiated into the proper worship of Krishna should always wear on their necks two rosaries made of Tulsi wood, one for Krishna and the other for Radha. After engaging in mental worship, let them reverently bow down before the pictures of Radha and Krishna, and repeat the eight syllabled prayer to Krishna (Sri-Krishnah saranam mama, 'Great Krishna is my soul's refuge') as many times as possible. Then let them apply themselves to secular affairs. Duty (Dharma) is that good practice which is enjoined both by the Veda (Sruti) and by the law (Smriti) founded on the Veda. Devotion (Bhakti) is intense love for Krishna accompanied with a due sense of his glory. Every day all my followers should go to the Temple of God, and there repeat the names of Krishna. The story of his life should be listened to with the great reverence, and hymns in his praise should be sung on festive days. Vishnu, Siv, Ganapati (or Ganesa), Parvati, and the Sun; these five deities should be honoured with worship. Narayana and Siva should be equally regarded as part of one and same Supreme Spirit, since both have been declared in the Vedas to be forms of Brahma. On no account let it be supposed that difference in forms (or names) makes any difference in the identity of the deity. That Being, known by various names—such as the glorious Krishna, Param Brahma, Bhagavan, Purushottama—the cause of all manifestations, is to be adored by us as our one chosen deity. The philosophical doctrine approved by me is the Visishtadvaita (of Ramanuja), and the desired heavenly abode is Goloka. There to worship Krishna and be united with him as the Supreme Soul is to be considered salvation. The twice-born should perform at the proper seasons, and according to their means, the twelve purificatory rites (sanskara), the (six) daily duties, and the Sraddha offerings to the spirits of departed ancestors. A pilgrimage to the Tirthas, or holy places, of which Dvarika (Krishna's city in Gujarat) is the chief, should be performed according to rule. Alms giving and kind acts towards the poor should always be formed by all. A tithe of one's income should be assigned to Krishna; the poor should give a twentieth part. Those males and females of my followers who will act according to these directions shall certainly obtain the four great objects of all human desires—religious merit, wealth, pleasure, and beatitude."¹

The Gazetteer of the Bombay Presidency has summarised the teachings embodied in the Shikshapatri in this way:—

"The book of precepts strictly prohibits the destruction of animal life; promiscuous intercourse with the other sex; use of animal food and intoxicant liquors and drugs on any occasion, suicide, theft and robbery; false accusation against a fellow-man; blasphemy; partaking of food with low caste people; caste pollution; company of atheists and heretics, and other practices which might counteract the effect of the founder's teachings."²

1. "Religious Thought and Life in India" by Monier Williams, pp. 155-58.
2. Gazetteer of the Bombay Presidency, Vol. IX, Part I, Gujarat Population, 1901, p. 537.

It is interesting to notice how a person is initiated into the sect of Satsangis. The ceremony of initiation is thus described in the Gazetteer of the Bombay Presidency —

The ceremony of initiation begins with the novice offering a palmful of water which he throws on the ground at the feet of the Acharya saying 'I give over to Swami Sahajanand my mind, body, wealth and sins of (all) births. Man, tan, dhan, and janmana pap.' He is then given the sacred formula 'Sri Krishna twam gatirmama', 'Sri Krishna thou art my refuge.' The novice then pays at least half a rupee to the Acharya. Sometimes the Acharya delegates his authority to admit followers as candidates for regular discipleship giving them the Panch Vartaman formula forbidding lying, theft, adultery, intoxication and animal food. But a perfect disciple can be made only after receiving the final formula from one of the two Acharyas. The distinguishing mark which the disciple is then allowed to make on his forehead, is a vertical streak of Gopichandan clay or sandal with a round redpowder mark in the middle and a necklet of sweet basil beads.¹

Now that we have seen the main events in the life and career of Swaminarayan and have examined the broad features of his teachings, it becomes very easy to decide the question as to whether the Swaminarayan sect constitutes a distinct and separate religion and cannot be regarded as a part of Hindu religion. In our opinion, the plea raised by the appellants that the Satsangis who follow the Swaminarayan sect form a separate and distinct community different from the Hindu community and their religion is a distinct and separate religion different from Hindu religion, is entirely misconceived. Philosophically, Swaminarayan is a follower of Ramanuja, and the essence of his teachings is that every individual should follow the main Vedic injunctions of a good, pious and religious life and should attempt to attain salvation by the path of devotion to Lord Krishna. The essence of the initiation lies in giving the person initiated the secret 'Mantra' which is "Lord Krishna thou art my refuge, Lord Krishna, I dedicate myself to thee." Acceptance of the Vedas with reverence, recognition of the fact that the path of Bhakti or devotion leads Moksha, and insistence on devotion to Lord Krishna unambiguously and unequivocally proclaim that Swaminarayan was a Hindu saint who was determined to remove the corrupt practices which had crept into the lives of the preachers and followers of Vallabhacharya, and who wanted to restore the Hindu religion to its original glory and purity. Considering the work done by Swaminarayan, history will not hesitate to accord him the place of honour in the galaxy of Hindu saints and religious reformers who by their teachings, have contributed to make Hindu religion ever-alive, youthful and vigorous.

It is, however, urged that there are certain features of Satsangi followers of Swaminarayan which indicate that the sect is a different community by itself and its religion is not a part of Hindu religion. It is argued that no person becomes a Satsangi by birth and it is only by initiation that the status of Satsangi is conferred on a person. Persons of other religions and Harijans can join the Satsangi sect by initiation. Swaminarayan himself is treated as a god and in the main temple, worship is offered to Swaminarayan pre-eminently, and that, it is argued, is not consistent with the accepted notions of Hindu religion. Women can take Diksha and become followers of Swaminarayan though Diksha to women is given by the wife of the Acharya. Five vows have to be taken by the followers of the Satsang, such as abstinence from drinking, from non-vegetarian diet, from illegal sexual relationship, from theft and from inter-pollution. Separate arrangements are made for Darshan for women, special scriptures are honoured and special teachers are appointed to worship in the temples. Mr Desai contends that having regard to all these distinctive features of the Swaminarayan sect, it would be difficult to hold that they are members of the Hindu community and their temples are places of public worship within the meaning of section 2 of the Act.

We are not impressed by this argument. Even a cursory study of the growth and development of Hindu religion through the ages shows that whenever a saint or a religious reformer attempted the task of reforming Hindu religion and fighting irrational or corrupt practices which had crept into it, a sect was born which was governed by its own tenets, but which basically subscribed to the fundamental notions of Hindu religion and Hindu philosophy. It has never been suggested that these sects are outside the Hindu brotherhood and the temples which they honour are not Hindu temples, such as are contemplated by section 3 of the Act. The fact that Swaminarayan himself is worshipped in these temples is not inconsistent with the belief which the teachings of Bhagvad-Gita have traditionally created in all Hindu minds. According to the Bhagvad-Gita, whenever religion is on the decline and irreligion is in the ascendance, God is born to restore the balance of religion and guide the destiny of the human race towards salvation.¹ The birth of every saint and religious reformer is taken as an illustration of the principle thus enunciated by Bhagvad-Gita; and so, in course of time, these saints themselves are honoured, because the presence of divinity in their lives inevitably places them on the high pedestal of divinity itself. Therefore, we are satisfied that none of the reasons on which Mr. Desai relies, justifies his contention that the view taken by the High Court is not right.

It is true that the Swaminarayan sect gives Diksha to the followers of other religions and as a result of such initiation, they become Satsangis without losing their character as the followers of their own individual religions. This fact, however, merely shows that the Satsang philosophy preached by Swaminarayan allows followers of other religions to receive the blessings of his teachings without insisting upon their forsaking their own religions. The fact that outsiders are willing to accept Diksha or initiation, is taken as an indication of their sincere desire to absorb and practise the philosophy of Swaminarayan and that alone is held to be enough to confer on them the benefit of Swaminarayan's teachings. The fact that the sect does not insist upon the actual process of proselytising on such occasions, has really no relevance in deciding the question as to whether the sect itself is a Hindu sect or not. In a sense, this attitude of the Satsang sect is consistent with the basic Hindu religious and philosophic theory that many roads lead to God. Didn't the Bhagvad-Gita say: "even those who profess other religions and worship their gods in the manner prescribed by their religion, ultimately worship me and reach me"². Therefore, we have no hesitation in holding that the High Court was right in coming to the conclusion that the Swaminarayan sect to which the appellants belong is not a religion distinct and separate from Hindu religion, and consequently, the temples belonging to the said sect do fall within the ambit of section 2 of the Act.

The present suit began its career in 1948 and it was the result of the appellants' apprehension that the proclaimed and publicised entry of the non-Satsangi Harijans would constitute a violent trespass on the religious tenets and beliefs of the Swaminarayan sect. The appellants must, no doubt, have realised that if non-Satsangi Hindus including Harijans enter the temple quietly without making any public announcement in advance, it would be difficult, if not impossible, to bar their entry; but since respondent No. 1 publicly proclaimed that he and his followers would assert their right of entering the temples, the appellants thought occasion had arisen to bolt the doors of the temples against them; and so, they came to the Court in the present proceedings to ask for the Court's command to prevent the entry of respondent No. 1 and his followers.

1. यदा यदा हि धर्मस्य ग्लानिर्भवति भारत ।
अभ्युत्थानमधर्मस्य तदात्मानं सृजाम्यहम् ॥
2. येऽप्यन्यदेवताभक्ता यजन्ते श्रद्धयान्विताः ।
तेऽपि मामेव कौन्तेय यजन्त्यविधिपूर्वकम् ॥

It may be conceded that the genesis of the suit is the genuine apprehension entertained by the appellants, but as often happens in these matters, the said apprehension is founded on superstition, ignorance and complete misunderstanding of the true teachings of Hindu religion and of the real significance of the tenets and philosophy taught by Swaminarayan himself

While this litigation was slowly moving from Court to Court, mighty events of a revolutionary character took place on the national scene. The Constitution came into force on the 26th January, 1950 and since then, the whole social and religious outlook of the Hindu community has undergone a fundamental change as a result of the message of social equality and justice proclaimed by the Indian Constitution. We have seen how the solemn promise enshrined in Article 17 has been gradually, but irresistibly, enforced by the process of law assisted by enlightened public conscience. As a consequence, the controversy raised before us in the present appeal has today become a matter of mere academic interest. We feel confident that the view which we are taking on the merits of the dispute between the parties in the present appeal not only accords with the true legal position in the matter, but it will receive the spontaneous approval and response even from the traditionally conservative elements of the Satsang community whom the appellants represent in the present litigation. In conclusion, we would like to emphasise that the right to enter temples which has been vouchsafed to the Harijans by the impugned Act in substance symbolises the right of Harijans to enjoy all social amenities and rights for, let it always be remembered that social justice is the main foundation of the democratic way of life enshrined in the provisions of the Indian Constitution.

The result is, the appeal fails and is dismissed with costs

K G S

Appeal dismissed

THE SUPREME COURT OF INDIA

(Civil Appellate Jurisdiction)

PRESENT — P B GAIENDRAGADKAR, Chief Justice, K N WANCHOO, M HIDAYATULLAH, V RAMASWAMI AND P SATYANARAYANA RAJU, JJ

The State Bank of Patiala (in both the Appeals)

*Appellant**

Ram Parkash and another

Respondents

National Industrial Tribunal (Bank Disputes) Award of June 1962 (Desai award) Paragraph 5 356—Directions contained in as to fitment into Sastry award of workmen who entered service before 1st January, 1959—Proper Interpretation

On the question of proper interpretation of paragraph 5 356 of the National Industrial Tribunal (Bank Disputes) Award of June 1962 (known as Desai award), which deals with the method of fitment of bank workmen who had entered service before 1st January, 1959 and who were not governed by All India Industrial Tribunal (Bank Disputes) Award, 1953 as modified by the Labour Appellate Tribunal Decision (Bank Disputes)—(known as Sastry award as modified)—into appropriate scales provided in the Sastry award as modified,

Held the adjusted basic pay in clause (ii) of paragraph 5 356 of the Desai award has to be taken as on 1st January, 1959 and not as on 1st January, 1962. This follows from the fact that under clause (i) of paragraph 5 356 the workman's basic pay as on 1st January, 1959 cannot be reduced and therefore when clause (ii) speaks of adjusted basic pay it must refer to the same date as in clause (i). Further clause (iv) of paragraph 5 356 of the Desai award which provides that the actual calculations start with the words "subject to rules (i) to (ii)" and therefore the actual calculation made under clause (iv) must be subject to clauses (i) and (ii). This means to effect that the actual fixation under sub-clauses (a) (b) and (c) of clause (iv) will be subject to clauses (i) and (ii). Under clause (iv) (a) a workman will be placed in the Sastry award as modified by placing him at the stage in the Sastry award scale equal to or next above his basic pay as on

1st January, 1959 in the scale then in force in the bank concerned. But in view of clause (i) of paragraph 5.356 this cannot be less than the actual basic pay of the workman as on 1st January, 1959. Where under clause (i) the actual basic pay as on 1st January, 1959 is more than what point-to-point adjustment will give under clause (ii) it cannot be reduced for clause (ii) is subject to clause (i). After this has been done the workman would be entitled to increments as provided in sub-clauses (b) and (c) of clause (iv), but this will be subject to clauses (i) and (ii) and the adjusted basic pay arrived at by giving the increments under sub-clauses (b) and (c) cannot exceed the adjusted basic pay as arrived at by point-to-point adjustment in the Sastry award as modified or the maximum of that scale or the actual basic pay as on 1st January, 1959, as the case may be. Thus sub-clause (a) of clause (iv) is subject to clause (i) and the basic pay to be fixed on 1st January, 1959 has to be fixed by reading sub-clause (a) of clause (iv) and clause (i) together. Then increments under sub-clauses (b) and (c) of clause (iv) have to be added, but this is again subject to the provisions of clauses (i) and (ii).

Then comes clause (iv) (d). But once it is held that basic pay under clause (ii) has to be worked out as on 1st January, 1959, the two increments provided by sub-clause (d) of clause (iv) which are beyond that date must be given over and above what has been worked out under sub-clauses (a), (b) and (c) of clause (iv). Therefore, two increments under clause (iv) (d) have to be given after adjustments have been made under sub-clauses (a), (b) and (c) of clause (iv). In effect, the two increments under clause (iv) (d) must always be given. But it may happen that increments under sub-clauses (b) and (c) may in some cases be not available where the actual pay as on 1st January, 1959 which will not be reduced under clause (i) happened to coincide with or was more than the adjusted basic pay under clause (ii).

Appeals by Special Leave from the Orders dated 17th and 1st April, 1965 of the Central Government Labour Court, Jullundur in Cases Nos. 409 and 410 of 1963 respectively.

C.K. Daphtary, Attorney-General for India, *S.V. Gupta*, Solicitor-General of India and *Niren De*, Additional Solicitor-General of India, (*K.B. Mehta*, Advocate, and *V. Sagar*, *H.L. Anand* and *B.C. Das Gupta*, Advocates of *M/s. Anand, Das Gupta and Sagar*, with them) for Appellant (In both the Appeals).

M.K. Ramamurthi, Advocate of *M/s. Ramamurthi & Co.* for Respondents (In both the appeals).

The Judgment of the Court was delivered by

Wanchoo, J.—These two appeals by Special Leave raise a common question as to the interpretation of paragraph 5.356 of the National Industrial Tribunal (Bank Disputes) Award of June, 1962 (popularly known as the Desai award) and will be dealt with together. It is unnecessary to set out the facts of the two appeals at this stage. It is sufficient to say that the respondents made applications under section 33-C (2) of the Industrial Disputes Act, XIV of 1947, praying for determination and computation of the benefit to which they were entitled under the Desai award as they were not satisfied with the fixation of their pay by the appellant-bank under paragraph 5.356.

The Desai award dealt with the method of adjustment in the scales of pay fixed by it from paragraph 5.329 onwards. It divided the employees of the banks with which it was concerned in two groups. The first group consisted of workmen who were drawing basic pay on 1st January, 1962 according to scales of pay provided by the All-India Industrial Tribunal (Bank Disputes) Award, 1953 (popularly known as the Sastry award) as modified by the Labour Appellate Tribunal Decision (Bank Disputes). The second group consisted of workmen who on 1st January, 1962 were employed in banks which were not governed by the provisions of the Sastry award as modified and were not thus drawing basic pay on the footing of scales of pay provided by that award. In the first case the Desai award provided that the workmen would be fitted in the new scales of pay from 1st January, 1962 on stage to stage adjustment basis i.e. workmen who were drawing basic pay at a particular stage in the time scale of the Sastry award as modified would draw basic pay

at the same stage in the new scale applicable to them under the Desai award. Examples of how this would be done were given in paragraph 5 348 of the Desai award. As to the second group, the Desai award provided that these employees would first be fitted in the appropriate scales provided in the Sastry award as modified as on 1st January, 1962 and thereafter they would be fitted in the new scales of pay provided by the Desai award as laid down in paragraph 5 348. Paragraph 5 356 then went on to provide how these workmen would be fitted in the Sastry award. Here again the workmen were divided into two groups, namely, those who entered service before 1st January, 1959 and those who entered service on or after 1st January, 1959. In the present appeals we are concerned with workmen who entered service before 1st January, 1959, and the fitment of these workmen was dealt with in paragraph 5 356 of the Desai award, and it is this paragraph which calls for interpretation in the present appeals.

We may at this stage mention that a similar question of fitment was considered by the Sastry award in paragraph 292 and certain provisions were made thereunder. This paragraph was considered by the Labour Appellate Tribunal in appeal from the Sastry award and certain modifications were made thereunder by paragraphs 164 and 166 of the Labour Appellate Tribunal decision in appeal. Paragraph 292 as modified by the Labour Appellate Tribunal decision came up for interpretation before this Court in *State Bank of India v Prakash Chand Mehra*¹. As the words of paragraph 292 of the Sastry award as modified by the Labour Appellate Decision are almost the same as the words of paragraph 5 356 of the Desai award, we may set out the two paragraphs in parallel columns for comparison.

Sastry award as modified by the Labour Appellate decision

Desai award

For workmen who entered service of the bank before 31st January, 1950

(1) The workman's basic pay as on 31st January, 1950 shall not be reduced in any case

(2) Subject to rule (1) the adjusted basic pay in the new scale shall not exceed what point to point adjustment would give him or the maximum in the new scale

(3) In the matter of adjustment all efficiency bars, whether in the previously existing scales or in the new scales fixed by us, should be ignored

(4) Subject to rules (1) to (3) workman's basic pay in the new scales shall be fixed in the following manner —

(a) A workman shall first be fitted into the scale of pay fixed by our award (herein

For workmen who entered service of the bank before 1st January, 1959

(i) The workman's basic pay as on 1st January, 1959 shall not be reduced in any case

(ii) Subject to rule (i), the adjusted basic pay in the scale provided in the Sastry award as modified shall not exceed what point to point adjustment would give him or the maximum in the scale provided by the Sastry award as modified

(iii) In the matter of adjustment, all efficiency bars, whether in the previously existing scales or in the scales provided by the Sastry award as modified should be ignored

(iv) Subject to rules (i) to (iii) a workman's basic pay in the scale provided by the Sastry award as modified shall be fixed in the following manner —

(a) A workman shall first be fitted into the scale of pay of Sastry award as modified by placing him at the

called the new scale) by placing him at the stage in the new scale equal to, or next above his basic pay as on 31st January, 1950 in the pre-Sen scale then in force (herein called the existing scale).

stage in the Sastry award scale as modified equal to, or next above his basic pay as on 1st January, 1959 in the scale then in force in the bank concerned (hereinafter called the bank's scale).

(b) To the basic pay into which he is fitted under clause (a) the annual increment or increments in the new scale as from that stage onwards should be added at the rate of one increment for every completed three years of service in the same cadre as on 31st January, 1950, up to a limit of 12 years' service; hereafter one increment for every four years of service up to another 8 years' service, and after that one increment for every five years of service.

(b) To the basic pay into which he is fitted under clause (a) annual increment or increments in scale provided by the Sastry award as modified as from that stage onwards should be added at the rate of one increment for every completed three years of his service in the same cadre as on 1st January, 1959.

(c) Such increments shall not however exceed four in number.

(c) Such increments shall not however exceed four in number.

[NOTE: Omitted by the Labour Appellate Tribunal in view of change in clause (b)]

(4-A) After adjustment sare made in accordance with clauses (a), (b) and (c) *supra* two further increments in the new scale will be added thereto for service for the two years 1951 and 1952. In addition the workman will be entitled to draw his normal increment for 1953 on 1st April, 1953. Thereafter each succeeding year's annual increment shall take effect as and from 1st April of that year.

(d) After adjustments are made in accordance with clauses (a), (b) and (c) *supra*, two further annual increments in the scale provided by the Sastry award as modified will be added thereto for service for the two years of 1960 and 1961.

We are not concerned with clauses (5) and (6) of paragraph 292 of the Sastry award or with clauses (v) and (vi) of paragraph 5.356 of the Desai award for purpose of the dispute between the parties and have not therefore set them out.

It will be seen from the above comparison of the provisions in the two awards that the substantial provisions of the Desai award are exactly the same as the provisions of the Sastry award as modified except (i) for changes necessitated by the fact that the Desai award was being given in 1962 and (ii) the provision in the Sastry award corresponding to sub-clause (d) of clause (iv) of paragraph 5.356 of the Desai award was separated by the Labour Appellate Tribunal Decision from clause (4) and made clause (4-A).

We have already referred to the fact that paragraph 292 of the Sastry award as modified came up for consideration before this Court in the case of *Prakash Chand Mehra*¹ and this Court interpreted clauses (1) to (4-A) of the Sastry Award as modified thus:

'We have therefore first to fix the basic pay in accordance with rule (4) (a) and then allow annual increments in accordance with rule (4) (b). But this is 'subject to rules (1) and (2) above. We are unable to accept the contention raised on behalf of the respondent that the words 'subject to' have not the effect of making what would otherwise follow from the application of rules (4) (a) and (4) (b) subject to both the limits laid down in rule (2). Giving as we must natural meaning to the words used in rules (2) and (4), we are of opinion that in no case can the basic pay be fixed at a higher figure than what the point to point adjustment would give to the workman or the maximum in the new scale.'

The dispute between the Bank and the workmen in the present case was this. The Bank claimed that under clause (ii) of the Desai award, the adjusted basic pay in the new scale was not to exceed what point to point adjustment would give an employee on 1st January, 1962. The bank further claimed that this being the maximum permissible under clause (ii) and clause (iv) being subject to clause (ii) the method of fitment provided in clause (iv) could not give to an employee more than the maximum arrived at under clause (ii). Thus the bank's case was that once the maximum arrived at by point to point adjustment as on 1st January, 1962 was reached under clause (ii) no further increments even under sub clause (d) of clause (iv) could be allowed. The workmen on the other hand claimed that they were entitled to what was provided by sub clauses (a), (b) and (c) of clause (iv) and the two increments under sub clause (d) and that it did not matter whether what was thus arrived at exceeded the maximum provided under clause (ii). The Labour Court has partially accepted the workmen's contention and fixed the pay of the two workmen concerned accordingly. The bank contests the correctness of this view.

We are of opinion that neither the stand taken by the bank nor the stand taken by the workmen is correct, and that the relevant clauses in paragraph 5356 of the Desai award must be interpreted in the same manner as the relevant provisions in the Sastry award as modified were interpreted in *Prakash Chand Mehra's case*¹. In this connection it is brought to our notice that in paragraph 5356 of the Desai award it was stated that the award was giving directions similar to those provided under the Sastry award as modified subject to certain changes which were considered necessary having regard to the lapse of time after coming into force of the provisions of the Sastry award as modified. It is urged on behalf of the appellant that the Desai award made certain changes and therefore need not be interpreted in the same way as was done in *Prakash Chand Mehra's case*¹. We see no force in this submission. It is true that the Desai award said that certain changes were being made, but these changes were considered necessary having regard to the lapse of time. However, the main intention of the Desai award was also to give directions similar to those provided in the Sastry award as modified. It is true that there are some verbal changes in the Desai award, but these verbal changes are only due to lapse of time and do not affect the substance of what was provided by the Sastry award as modified.

We do not agree with the case of the appellant bank that in clause (ii) the adjusted basic pay is to be as on 1st January, 1962. We are of opinion that the adjusted basic pay in clause (ii) has to be taken as on 1st January, 1959. This follows from the fact that the workman's basic pay as on 1st January, 1959 cannot be reduced and therefore when clause (ii) speaks of adjusted basic pay it must refer to the same date as in clause (i). Further clause (iv) which provides for actual calculations starts with the words 'subject to rules (i) to (iii)' and therefore the actual calculations made under clause (iv) must be subject to clauses (i) and (ii). This means in effect that the actual fixation under sub-clauses (a), (b)

and (c) of clause (iv) will be subject to clause (i) and clause (ii). Under sub-clause (a) of clause (iv) a workman will be placed in the Sastry award as modified by placing him at the stage in the Sastry award scale equal to or next above his basic pay as on 1st January, 1959 in the scale then in force in the bank concerned. But in view of clause (i) this cannot be less than the actual basic pay of the workman as on 1st January, 1959. Where under clause (i) the actual basic pay as on 1st January, 1959 is more than what point-to-point adjustment will give under clause (ii), it cannot be reduced for clause (ii) is subject to clause (i). After this has been done the workman would be entitled to increments as provided in sub-clause (b) read with sub-clause (c) of clause (iv), but this will be subject to clauses (i) and (ii) and the adjusted basic pay arrived at by giving the increments under sub-clauses (b) and (c) cannot exceed the adjusted basic pay as arrived at by point-to-point adjustment in the Sastry award as modified or the maximum of that scale or the actual basic pay as on 1st January, 1959, as the case may be. Thus sub-clause (a) is subject to clause (i) and the basic pay to be fixed on 1st January, 1959 has to be fixed by reading sub-clause (a) of clause (iv) and clause (i) together. Then increments under sub-clause (b) read with sub-clause (c) of clause (iv) have to be added, but this is again subject to the provisions of clauses (i) and (ii).

After this has been worked out, then comes sub-clause (d) of clause (iv), and the main dispute in the present case is about this sub-clause. The appellant-bank's contention is that two further annual increments allowed under sub-clause (d) cannot be permitted in view of clause (ii) as interpreted by the appellant. But as we have held that in clause (ii) the adjusted basic pay has to be fixed as on 1st January, 1959, sub-clause (d) of clause (iv) will take effect and give two annual increments for 1960 and 1961 which are beyond the date which we have accepted as the right date for purposes of clause (ii). It is however urged on behalf of the appellant that sub-clause (d) is also subject to clauses (i) to (iii) and therefore these increments if they go beyond what clause (ii) provides cannot be given. This argument has arisen because the Desai award did not separate sub-clause (d) as was done by the Labour Appellate Tribunal in its modification of the Sastry award. But as stated by the Labour Appellate Tribunal when dealing with the Sastry award, it was inherent in the Sastry award that increments for 1951 and 1952 should be provided after the basic pay was worked out as on 31st January, 1950. The same applies to the Desai award. Once it is held—and that we hold—that basic pay under clause (ii) has to be worked out as on 1st January, 1959, the two increments provided by sub-clause (d) of clause (iv) which are beyond that date must be given over and above what has been worked out under sub-clauses (a), (b) and (c) of clause (iv) of the Desai award. The fact that by oversight sub-clause (d) of clause (iv) was not made a separate clause would make no difference for sub-clause (d) provides for a period after the date upto which clause (ii) works. Therefore, two increments under sub-clause (d) have to be given after adjustments have been made under sub-clauses (a), (b) and (c) of clause (iv) in accordance with what we have interpreted these sub-clauses as well as clauses (i) and (ii) to mean. In effect the two increments provided in sub-clause (d) must always be given. But it may happen that increments provided in sub-clause (b) read with sub-clause (c) may in some cases be not available where the actual pay as on 1st January, 1959 which will not be reduced under clause (i) happened to coincide with or was more than the adjusted basic pay under clause (ii). This interpretation is in accord with what was decided by this Court in *Prakash Chand Mehra's case*¹ and that decision in our opinion would govern the interpretation of paragraph 5.356 of the Desai award also, which as we have indicated, is in substance the same as paragraph 292 of the Sastry award as modified by the Labour appellate decision.

1. (1961) 1 S.C.J. 591; (1961) 2 L.L.J. 383; A.I.R. 1962 S.C. 1261.

We now turn to the actual fixation of pay in each case. We shall first take the case of Ram Parkash (*re* C.A. No 1008). He joined service on 11th April, 1949. His basic pay as on 1st January, 1959 was Rs 106. His place of posting was Pbagwara in Area III. Point to point adjustment as on 1st January, 1959 would give him Rs 106 in the Sastry award scale as modified. This is equal to his actual salary as on 1st January, 1959. Therefore under sub-clause (a) of clause (iv) his salary has to be fixed as on 1st January, 1959 at Rs 106. He would not be entitled to any increments under sub-clauses (b) and (c), because his actual salary coincided with the adjusted basic pay in the Sastry award scale as modified as on 1st January, 1959. He would however be entitled to two increments under sub-clause (d) for the years 1960 and 1961 and his salary therefore as on 1st January, 1962 under the Sastry award would come to Rs 119. As Rs 119 is the eleventh stage in the Sastry scale Ram Parkash would be entitled to the eleventh stage in the Desai scale, which would be Rs 170. The bank actually fixed him at Rs 176 on its own interpretation of the award. In the circumstances, Ram Parkash was not entitled to any relief from the Labour Court.

Tek Chand Sharma respondent in C.A. No 1009 was appointed on 15th November, 1950. His salary as on 1st January 1959 was Rs 100 and his place of posting was Nakodar in Area IV of the Sastry award. His salary according to point to point adjustment would come to Rs 85. But under clause (i) his salary cannot be fixed below Rs 100, which he was actually getting. Under sub-clause (a) of clause (iv) his salary will be fixed at Rs 100. He would not be entitled to any increments under sub-clauses (b) and (c) of clause (iv) because he was getting more than what would be his adjusted basic pay under clause (ii). Therefore, for purposes of sub-clause (a) of clause (iv) he would be fixed at Rs 100 as on 1st January, 1959, and would be entitled to increments under sub-clause (d) which will bring his salary to Rs 112 as on 1st January, 1962. This is the thirteenth stage in the Sastry scale. Nakodar is now in Area III in the Desai award. The thirteenth stage in the Desai award scale is Rs 182 for that area. So his salary as on 1st January, 1962 would be fixed at Rs 182. In addition he is entitled to two increments on account of being a graduate and one increment on account of his having passed the Indian Institute of Bankers' examination. His actual salary in the Desai scale on 1st January, 1962 will be Rs 182 plus Rs 33 *i.e.* Rs 215. The bank fixed him on Rs 193. The award of the Labour Court therefore in the case of Tek Chand Sharma is correct.

We therefore allow No. C.A. 1008 and set aside the order of the Labour Court and dismiss the application of Ram Parkash. We make no order as to costs in the circumstances. C.A. No 1009 is hereby dismissed. We make no order as to costs in the circumstances.

V K,

C.A. No 1008 of 1965 allowed,
C.A. No 1009 of 1965 dismissed

THE SUPREME COURT OF INDIA

(Civil Appellate Jurisdiction)

PRESENT —A K SARKAR, J R MUDHOLKAR AND R S BACHAWAT, JJ

Girdharilal Amratlal Shodan and others

*Appellants**

v

The State of Gujarat and others

Respondents

Land Acquisition Act (I of 1894) Sections 6 and 48—Scope—Acquisition for a public purpose—Notification under section 6 after complying with sections 4 and 5 A—Such notification found invalid—Government cancelling invalid notification and issuing fresh notification without again complying with sections 4 and 5 A—Validity

A notification under section 4 of the Land Acquisition Act was issued by the Government of Gujarat on 3rd August, 1960 stating that a certain land was likely to be needed for a public purpose. An enquiry under section 5-A was duly held and a report under section 5-A (2) was made to the Government. Thereafter on 18th July, 1961 the State Government issued a notification under section 6 stating that the land was needed for a public purpose. Later realising that the notification under section 6 was not in accordance with law, the Government cancelled the said notification and in its stead issued a fresh notification under section 6 on 14th August, 1964 without a fresh compliance with sections 4 and 5-A. On the question of the validity of the second notification,

Held, the notification dated 14th August, 1964 was validly issued.

The contention that by cancelling the notification dated 18th July, 1961 the Government must be taken to have withdrawn from the acquisition and cancelled the notification under section 4, dated 3rd August, 1960 also and consequently the Government could not issue the notification under section 6 dated 14th August, 1964 without a fresh compliance with sections 4 and 5-A, is clearly untenable. Where the notification under section 6 is incompetent and invalid, the Government may treat it as ineffective and issue a fresh notification. The cancellation of the first notification was no more than a recognition of its invalidity. There is nothing in section 48 which precluded the Government from treating the earlier invalid notification as ineffective and issuing in its place an effective notification under section 6.

Appeal from the Judgment and Order dated the 2nd April, 1965 of the Gujarat High Court in Special Civil Application No. 584 of 1961.

Niren De, Additional Solicitor-General of India, (*J. B. Dadachanji*, Advocate of *M/s. J. B. Dadachanji & Co.*, with him) for Appellants.

R. Ganapathy Iyer and *B.R.G.K. Achar*, Advocates, for Respondents Nos. 1 and 2.

Arun H. Mehta, *M.N. Shroff* and *I.N. Shroff*, Advocates, for Respondent No. 3.

The Judgment of the Court was delivered by

Bachawat, J.—On 3rd August, 1960, the Government of Gujarat issued a notification under section 4 of the Land Acquisition Act, 1894 (hereinafter referred to as the Act) stating that the land measuring about 7,151 sq. yards in Final Plot No. 460 of the Town Planning Scheme No. III of Ellisbridge in Ahmedabad taluka city, village Changispur, was likely to be needed for a public purpose, *viz.*, for construction of houses for Shri Krishnakunj Government Servants Co-operative Housing Society, Ltd., Ahmedabad. The land is the subject-matter of a trust of which appellant No. 1 is the trustee and appellants Nos. 2 to 6 are the beneficiaries. An enquiry under section 5-A of the Act was duly held, and a report under section 5-A (2) was made to the Government. On 18th July, 1961, the State Government issued a notification under section 6 of the Act stating that the land was needed to be acquired for the aforesaid public purpose at the expense of Shri Krishnakunj Government Servants Co-operative Housing Society, Ltd. On 22nd September, 1961, the appellants filed a writ application in the High Court of Gujarat praying for an order quashing the notification under section 6 dated 18th July, 1961. During the pendency of this application, the Government issued a notification dated 28th April, 1964 cancelling the aforesaid notification dated 18th July, 1961. On 14th August, 1964, the Government issued a fresh notification under section 6 stating that the land was needed to be acquired at the public expense for a public purpose, *viz.*, for the Housing Scheme undertaken by Shri Krishnakunj Government Servants Co-operative Housing Society, Ltd., Ahmedabad with the sanction of the Government. The appellants were thereupon allowed to amend the writ petition, and by the amended writ petition, they prayed for an order quashing the notification under section 6 dated 14th August, 1964 as also the notification under section 4 dated

3rd August, 1960 On 2nd April, 1965, the High Court dismissed the application. The appellants now appeal to this Court on a certificate granted by the High Court.

Counsel for the appellants submitted that the power of the State Government to cancel a notification under section 6 of the Act implied by section 21 of the General Clauses Act, 1897 is subject to the condition that the Government should withdraw from the acquisition as provided for in section 48 of the Act. By cancelling the notification under section 6, dated 18th July, 1961, the Government must be taken to have withdrawn from the acquisition and cancelled the notification under section 4, dated 3rd August, 1960 also and consequently the Government could not issue the notification under section 6, dated 14th August, 1964 without issuing a fresh notification under section 4 and making a fresh enquiry under section 5-A. Counsel for the respondents disputed the correctness of this submission.

It is to be noticed that the notification under section 6 dated 18th July, 1961 stated that the land was required for a public purpose at the expense of Shri Krishnakunj Government Servants Co-operative Housing Society Ltd. The Government had no power to issue this notification. Having regard to the proviso to section 6 of the Act, a declaration for acquisition of the land for a public purpose could only be made if the compensation to be awarded for it was to be paid wholly or partly out of public revenues or some fund controlled or managed by a local authority. The Government had no power to issue a notification for acquisition for a public purpose where the compensation was to be paid entirely by a company. The notification dated 18th July, 1961 was, therefore, invalid and of no effect, see *Shyam Behari v State of Madhya Pradesh*¹. The appellants filed the writ petition challenging the aforesaid notification on this ground. The challenge was justified and the notification was liable to be quashed by the Court. The State Government realised that the notification was invalid and without waiting for an order of Court, cancelled the notification on 28th April, 1964. The cancellation was in recognition of the invalidity of the notification. The Government had no intention of withdrawing from the acquisition. Soon after the cancellation the Government issued a fresh notification under section 6. Where, as in this case, the notification under section 6 is incompetent and invalid, the Government may treat it as ineffective and issue a fresh notification under section 6. This is what, in substance, the Government did in this case. The cancellation on 28th April, 1964 was no more than a recognition of the invalidity of the earlier notification. There is nothing in section 48, which precluded the Government from treating the earlier invalid notification as ineffective and issuing in its place an effective notification under section 6. Where the notification under section 6 is lawful and valid, a question may well arise whether the Government can cancel it without withdrawing from the acquisition, as provided for under section 48. But no such question arises in this case, and we express no opinion on it.

Counsel for the appellants next submitted that on issuing the notification dated 18th July, 1961 the power of the State Government to issue a notification under section 6 was exhausted and the Government could not issue a fresh notification under section 6. There is no substance in this contention. The notification dated 18th July, 1961 was invalid. By the issue of this notification, the Government had not effectively exercised its power under section 6. In the circumstances, the Government could well issue the fresh notification under section 6, dated 14th August, 1964.

Counsel for the appellants next submitted that the notification under section 6 must be issued without unreasonable delay after the issue of the notifica-

tion under section 4 and consequently, the notification, dated 14th August, 1964 is invalid, as it was issued after unreasonable delay. This contention was not raised in the High Court. On 25th September, 1961, soon after the filing of the writ petition, the appellants obtained an injunction restraining the Government from proceeding with the acquisition. We are informed that this injunction continued for some time and was modified at a later date. Until the modification of the injunction, the Government could not take further steps in the acquisition. The question whether there was unreasonable delay in the issuing of the notification dated 14th August, 1964 was not put in issue and was not investigated in the Court below. We, therefore, indicated in the course of the argument that the appellants cannot be allowed to urge this point for the first time in this Court. We express no opinion one way or the other whether the Government is bound to issue the notification under section 6 without unreasonable delay after the issue of the notification under section 4.

In the High Court, the appellants contended that the public purpose set out in the notification dated 14th August, 1964 was different from the public purpose set out in the notification dated 18th July, 1961 and the Government could not issue the notification dated 14th August, 1964 without issuing a fresh notification under section 4. The High Court repelled this contention. It found that the public purpose set out in the notification dated 14th August, 1964 was identical with the public purpose set out in the notification dated 18th July, 1961. This finding is no longer challenged before us.

The appeal fails, and is dismissed with costs.

V.K.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—P. B. GAJENDRAGADKAR, *Chief Justice*, K. N. WANCHOO, M. Hidayatullah, J. C. SHAH AND S. M. SIKRI, JJ.

Nathia Agarwalla and another.

.. *Appellants**

v.

Jahanara Begum and others

.. *Respondents.*

Assam Non-agricultural Urban Areas Tenancy Act (XII of 1955), section 5 (1) (a)—If applies to pending execution proceedings.

Section 5 (1) (a) of the Assam Act XII of 1955 does not apply to pending execution proceedings in respect of decrees for ejectments granted before the coming into force of that Act. Thus, the protection of section 5 (1) (a) will not be available in execution cases pending at the date of commencement of the Assam Act XII of 1955 in respect of decrees already won before its commencement.

Appeal by Special Leave from the Judgment and Order dated the 14th August, 1959 of the Assam High Court in Appeal from Original Order No. 21 of 1959.

M. C. Setalvad, Senior Advocate (B. P. Maheswari and M. S. Narasimhan, Advocates, with him) for Appellants.

B. Sen, Senior Advocate (P. K. Ghosh, Advocate, with him), for Respondents.

The Judgment of the Court was delivered by

Hidayatullah, J—This is an appeal by Special Leave against an order of the High Court of Assam dated 14th August, 1959, rejecting summarily an appeal in an execution case. The appellants against whom the decree for ejectment is being executed are the widow and son of one Maliram Agarwala whose father Arjun Das had taken on lease the suit land from one Mohd Soleman, predecessor in interest of the respondents. The decree was passed as far back as 28th November, 1950, in a title suit filed against the appellants and was later confirmed by the High Court.

The present execution began on 16th August, 1954 and was pending in the Court of the Subordinate Judge, L A D Gauhati when the Assam Non Agricultural Urban Areas Tenancy Act, 1955 (Assam Act XII of 1955) came into force from 26th June, 1955. The appellants thereupon claimed the benefit of section 5 of the Act which grants protection from eviction to tenants under certain circumstances. The Execution Court heard arguments and on 12th November, 1957, held that the protection of section 5 was available not only in pending suits and appeals but also in pending execution cases. In reaching this conclusion the learned Judge followed a decision of the Assam High Court reported in *Harsukh Saraggl and another v Mashulal Khemani and another*¹ and of the Calcutta High Court in *Habiba Bibi and others v Rani Ranjan Mullick and others*². He accordingly fixed the case for evidence to find out if there existed facts necessary for the application of section 5 of the Act. Subsequently the Presiding Judge having changed, the point was reopened on 6th June, 1959 by the successor Judge. That learned Judge following a later decision of the Assam High Court in *Suresh Chandra Datta v Ashutosh Datta and others*³ held that section 5 (1) (a) was not applicable to execution proceedings and the pending execution must proceed according to law. The only question in this case is whether the provisions of section 5 (1) (a) of the Tenancy Act apply to pending execution proceedings.

The Act was passed 'to regulate in certain respects the relationship between landlord and tenant in respect of non agricultural land in urban areas of the State of Assam'. It consists of 14 sections. Section 5, with which we are primarily concerned, may be read in full. It reads—

5. Protection from eviction—

(1) Notwithstanding anything in any contract or in any law for the time being in force—

(a) where under the terms of a contract entered into between a landlord and his tenant whether before or after the commencement of this Act, a tenant is entitled to build and has in pursuance of such terms actually built within the period of five years from the date of such contract a permanent structure on the land of the tenancy for residential or business purposes or where a tenant not being so entitled to build, has actually built any such structure on the land of the tenancy for any of the purposes aforesaid with the knowledge and acquiescence of the landlord the tenant shall not be ejected by the landlord from the tenancy except on the ground of non payment of rent,

(b) where a tenant has effected improvements on the land of the tenancy under the terms whereof he is not entitled to effect such improvements the tenant shall not be ejected by the landlord from the land of the tenancy unless compensation for reasonable improvements has been paid to the tenant.

(2) No tenant shall be ejected by his landlord from the land of the tenancy except in execution of a decree for ejectment passed by a competent civil Court.

(3) No decree for ejectment passed on the ground of non payment of rent shall be executed within a period of thirty days from the date of the decree. If the tenant pays into the Court whose duty it is to execute the decree the entire amount payable under the decree within the aforesaid period the Court shall record the decree as satisfied.

The remaining sections may be shortly noticed before we proceed to construe section 5. The first three sections contain respectively the short title, the extent of application and the definitions of terms in the Act. Section 4 puts an obligation upon a tenant to pay rent for his holding at fair and equitable rates. Section 6 lays down how compensation for improvements in a suit for ejectment against a tenant is to be calculated and includes within improvements structures, which the tenant entitled to build has actually built after the expiry of the period of five years referred to in clause (a) of sub-section (1) of section 5. Sections 7, 8 and 9 deal with the question of enhancement of rent from different points of view. Section 10 prohibits the realisation of any "salami". Section 11 provides that no suit for ejectment, except for arrears of rent, shall be instituted until after the expiration of one month from the date of the receipt by the tenant of a notice in writing by the landlord requiring the tenant to surrender possession of the land in favour of the landlord. Section 12 shows how the notices have to be served and section 13 gives the power to make Rules. By section 14, the Sylhet Non-Agricultural Urban Areas Tenancy Act, 1917 (Assam Act X of 1947) was repealed.

The only question in this appeal is whether section 5 (1) (a) of the Act, which we have reproduced above, applies to execution cases in respect of decrees for ejectment granted before the coming into force of the Tenancy Act. The answer to this question will determine which of the two orders passed by the respective presiding Judges was right.

Two methods of approach were adopted by Counsel in this appeal. One was to construe the words of the fifth section taken by themselves or in comparison with those employed in other Acts of the Assam Legislature. The second was to compare and contrast section 5 of the Assam Act with enactments in Rent Control Acts of other States. The second method although sometimes instructive is not to be commended because similarity or variation in the laws of different States is not necessarily indicative of a kindred or a changed intention. Enactments drafted by different hands, at different times and to satisfy different requirements of a local character, seldom afford tangible or sure aid in construction. We would, therefore, put aside the Rent Control Acts of Madras, Bihar, Delhi and other States, because in these States the problem of accommodation in relation to the availability of lands and houses and the prior legislative history and experience, cannot be same as in Assam. We shall, however, refer to other Rent Control Acts of the Assam Legislature because they do not suffer from this weakness and may throw some light on how the Legislature was accustomed to view such matters. But before we do so we shall consider section 5 taken by itself.

The section consists of three sub-sections and it is helpful to view the provisions backwards, that is, from the last sub-section to the first. The third sub-section deals with a decree of ejectment passed on the ground of non-payment of rent. It affords a last chance to the tenant to retain the land of his tenancy by making such a decree unexecutable for a period of 30 days from its date so that the tenant may, if he cares, deposit the amount of the decree in the Court which will execute that decree. On the tenant so paying, the decree is recorded as satisfied. This sub-section must apply to all executions which come within its terms because of the clear language "no decree for ejectment * * * shall be executed" and "the Court shall record the decree as satisfied". These are peremptory words and they do not admit of any exception. All decrees for ejectment in which thirty days' time had not passed were affected but, it is clear, that decrees which did not come within the terms of the sub-section remained executable.

We may now examine the second sub-section which also takes away some rights of landlords but leaves them free to execute decrees other than those on which

the section places an embargo. That sub section provides that no tenant shall be ejected by his landlord from the land of his tenancy except in execution of a decree for ejectment passed by a competent civil Court. Although this sub-section takes away the right of ejectment in other ways if any, it recognises that ejectment is possible provided there is a decree of a competent civil Court.

We may now consider the first sub section. Certain matters appear on its face. The sub section does not speak of an ejectment decree, but of the right of the landlord to eject his tenant. It begins by stating "notwithstanding anything in any contract or in any law for the time being in force" but it does not include decrees for ejectment already obtained, in the *non obstante* clause. Such decrees could have easily been named, to include them within the protective provisions, but they were not. The operative parts of the sub section protect tenants under two circumstances which are mentioned as (a) and (b). Taking (b) first if the tenant effects improvements on the land which he is not entitled to effect, the landlord may not eject him unless he pays reasonable compensation. Who will assess the compensation is laid down in section 6 but that section specifically mentions a suit for ejectment and not execution proceeding. All this seems to suggest that section 5 (1) (b) is intended to operate on rights of the landlord which are being enforced by a suit but not on rights already enforced and determined. By speaking of the curtailment of the landlord's right and by omitting to provide for decrees into which the rights merge and by mentioning the provisions of section 6 if the provisions of section 5 are to be invoked in a suit for ejectment it appears that the decrees as such are not put under the same embargo.

So far there is nothing in section 5 which would suggest that its provisions cover decrees in which the rights had passed before the coming into force of the Act. It remains to see whether section 5 (1) (a) strikes a different note. Part (a) of section 5 (1) is constructed on very similar lines and does not admit a different approach. It protects tenants of land from ejectment by the landlord in those cases in which the tenant entitled to build on the land under his contract has actually built a permanent structure within five years from the date of his contract, or has without such right built with the knowledge and acquiescence of the landlord. Such tenant may not be ejected except for non payment of rent. Clause (a) applies alike to contracts made before or after the commencement of the Act. This creates some doubt but as it intends to operate on the rights of the landlord seeking to enforce them against a tenant, who claims that he cannot be ejected, the clause must again contemplate a suit and not execution proceedings. There is nothing to distinguish clause (a) from clause (b) in so far as execution of decrees already granted is concerned.

The decision of the Assam High Court in *Suresh Chandra v. Ashutosh Dutta*, (supra)¹ expressed the same conclusion but on a slightly different reasoning. The conclusion is further strengthened when one reads the cognate sections of the earlier Assam Acts passed by the same Legislature. Section 14 of the Sylhet Non Agricultural Urban Areas Tenancy Act, 1947 (Assam Act X of 1947) now repealed by the Act we are considering, provided in clear terms that proceedings in execution were included. It reads as follows —

14. Pending suits

The provisions of this Act shall have effect in respect of all suits or proceedings in execution for ejectment of a person who would under the provisions of this Act be an occupancy tenant which are pending at the date of commencement of this Act.

Similarly, section 6 (1) of the Assam Urban Areas Rent Control Act, 1949 (Assam Act XIII of 1949) and section 6 (1) of the Assam Urban Areas Rent Control Act, 1946 (Assam Act III of 1946) provided specially for execution proceedings. These two sections read the same and only one of them may be read. Section 6 (1) of Act XIII of 1949 read

"6. Bar against passing and execution of decree and orders—

(1) No order or decree for the recovery of possession of any house shall be made or executed by any Court so long as the tenant pays rent to the full extent allowable under this Act and perform the conditions of the tenancy:

Provided that nothing in this sub-section shall apply in a suit or proceedings for eviction of the tenant from the house—

(a) where the tenant has done any act contrary to the provisions of clause (m), clause (o) or clause (p) of section 108 of the Transfer of Property Act, 1882 or to the spirit of the aforesaid clauses in areas where the Act does not apply, or

(b) where the tenant has been guilty of conduct which is a nuisance or an annoyance to the occupiers of the adjoining or neighbouring houses, or

(c) where the house is *bona fide* required by the landlord either for purposes of repairs or re-building, or for his own occupation or for the occupation of any person for whose benefit the house is held, or where the landlord can show any other cause which may be deemed satisfactory by the Court, or

(d) where the tenant sublets the house or any part thereof or otherwise transfers his interest in the house or any part thereof without permission in writing from the landlord.

* * * * *

These enactments, which are quite explicit show, that where the Assam Legislature wished it, it included execution proceedings within the protection. Being aware that if execution proceedings are to be included they need to be mentioned and having at hand the former sections as models, the departure appears to be deliberate. The language chosen places the right under an embargo but does not say that decrees already won would become unexecutable thus stating clearly that they were not to be affected. The decision under appeal was, therefore, right.

The appeal has no force; it fails and will be dismissed with costs.

V.K.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—P. B. GAJENDRAGADKAR, *Chief Justice*, K. N. WANCHOO, M. HIDAYATULLAH, V. RAMASWAMI AND P. SATYANARAYANA RAJU, JJ.

The Divisional Personnel Officer, Southern Railway, Mysore .. *Appellant**

v.

S. Raghavendrachar

.. *Respondent.*

Constitution of India (1950), Article 311—Scope—Reversion of a Government servant from a higher officiating post to his substantive post while his junior was retained in the higher officiating post—If amounts to "reduction in rank" as to attract Article 311.

Indian Railway Establishment Code, Volume I, Rules 1609 to 1619—Scope.

It may be taken to be settled by the decisions of the Supreme Court that since Article 311 of the Constitution of India makes no distinction between permanent and temporary posts, its protection must be held to extend to all Government servants holding permanent or temporary posts or officiating in any of them, but that protection is limited to the imposition of three major penalties contemplated by the service rules, *viz.*, dismissal, or removal or reduction in rank.

One test for determining whether the termination of service was by way of punishment or otherwise is to ascertain whether under the service rules, but for such termination, the servant has the right to hold the post.

When a person officiating in a higher post is reverted to his original post for unsatisfactory work, that reversion by itself would not amount to reduction in rank. Similarly, losing some places in the seniority list is not tantamount to reduction in rank.

The Southern Railway has two grades of Train Examiners. The respondent and one B were promoted from the lower grade to officiate in the higher grade. The respondent was shown at item No 2 and B at item No 3 in the promotion list. A note was appended to the order that the promotion of the respondent and B were 'purely provisional subject to revision when seniority lists were drawn up for the Division'. Subsequently the respondent was reverted to the lower grade while B's junior was retained in the higher grade. The case of the respondent was that B was junior to him and that since he was reverted while B was not, it amounted to reduction in rank in far as he was concerned.

Held the reversion of the respondent to his substantive post notwithstanding that his junior was retained in the higher post did not amount to a reduction in rank and the provisions of Article 311 were not attracted. The respondent's rank in the substantive post *ie*, in the lower grade, was in no way affected by the reversion. In the substantive grade, the respondent retained his rank and he was visited with no penal consequences. Once it was accepted that the respondent had no right to the post in which he was provisionally promoted, there can be no doubt that his reversion did not amount to a reduction in rank.

The respondent cannot also challenge the order on the ground that rules 1609 to 1619 of the Indian Railway Establishment Code, Vol. I were contravened. Rules 1609 to 1618 apply only to Gazetted railway servants and the respondent was not a Gazetted railway servant. Rule 1619 refers to non gazetted railway servants and provides that in general conformity with the principles laid down in the preceding rules applicable to Gazetted servants, a General Manager may frame detailed rules for the preparation, submission and disposal of confidential reports on Non gazetted railway servants. But the respondent could not place before the Court those rules if any, and hence cannot complain of their contravention.

Appeal by Special Leave from the Judgment and Order, dated the 12th December, 1962, of the Mysore High Court in W P No 531 of 1961.

Bishan Narain, Senior Advocate (*Naunil Lal* and *B R G K Achar*, Advocates, with him) for Appellant.

S K Venkatarangaiengar and *R Gopalakrishnan* Advocates, for Respondent.

The Judgment of the Court was delivered by

Satyamarayana Raju, J—This appeal, by Special Leave, raises a somewhat important question of law which is whether the reversion of a Government servant from an officiating post to his substantive post, while his junior is officiating in the higher post, does not, by itself, constitute a reduction in rank within the meaning of Article 311 (2) of the Constitution.

For the purpose of deciding the point raised in the appeal, it would be necessary to state the material facts. The Southern Railway has two grades of Train Examiners, one in the scale of Rs 100-5-125-6-185 and the other in the scale of Rs 150-225. The respondent was employed in the lower scale as a Train Examiner. By an order dated 7th April, 1959, the respondent was promoted to officiate in the higher scale with a starting salary of Rs 150 per month. That order read as follows:

'2. Shri S. Raghavendrachar, TXR—YPR in scale Rs 100—185 is promoted to officiate as TXR in scale Rs 150—225 on Rs 150 per month and retained YPR as TXR IC.

3. Shri James Blazey TXR—MYS in scale Rs 100—185 is promoted to officiate as TXR in scale Rs 150—225 on Rs 150 per month and transferred to SBC BG *vide* item 1 above. Sanction endorsed by D S for promotion of items 2 and 3.

There is a note appended to the order which is important.

* Note 1. The promotion of items 2 and 3 are purely provisional subject to revision when Divisional Seniority lists are drawn up.

By an order, dated 27th November, 1959, the respondent was reverted. That order was as follows :

"Shri S. Raghavendrachar, TXR/YPR (officiating) in scale Rs. 150—225 is reverted to scale Rs. 100—185 on Rs. 130 per month and transferred to SBC/MG."

On receipt of this order, the respondent made representations to the appellant. The appellant sent to the respondent communication, dated 25th May, 1960:

"As per the existing instructions an officiating employee with less than 18 months of service in the higher grade may be reverted to lower scale without assigning any reason for such reversion by a competent authority. Since the period of your officiating in scale Rs. 150—225 was less than 18 months and since your reversion from scale Rs. 150—225 to Rs. 100—185 has been ordered by a competent authority, no reasons need be assigned as requested in your representation dated 8th/9th December, 1959.

As regards the confirmation of TXRs in scale Rs. 150—225, who were your juniors while you were officiating in scale Rs. 150—225, I have to advise you that consequent on your reversion to scale Rs. 100—185, all your juniors, in scale Rs. 150—225, have become your seniors and their confirmations in preference to you are in order.

Regarding your re-promotion to scale Rs. 150—225, it will be considered in the normal course according to your seniority and suitability to hold the post in scale Rs. 150—225".

The respondent made a further appeal to the Divisional Superintendent, Mysore, on 2nd July, 1960 and sent him two reminders. Not having got any response, he filed an appeal on 31st January, 1961, to the General Manager, Southern Railway. The respondent sent a reminder to the letter on 31st March, 1961. In reply, the Divisional Personnel Officer wrote to the respondent as follows, by letter dated 30th April, 1961:

"Your reversion from an officiating post on scale Rs. 150—225 (PS) was not a penalty as presumed by you, in your above representations. The vacancy thus released by you in scale Rs. 150—225 (PS) and the vacancies which existed on the date of your reversion were filled up on 14th February, 1960. You are therefore eligible to be considered for promotion against a vacancy which occurred after the date of your reversion and not against the vacancies which existed on the date of your reversion and also the vacancy caused by your reversion. No regular vacancy (other than short term leave vacancy) in scale Rs. 150—225 has occurred from the date of your reversion till date. You will therefore be considered for promotion against the next vacancy, subject to the condition of seniority-cum-suitability, on the basis of which only promotions to non-selection posts are to be ordered.

2. As regards seniority, all those hitherto promoted to scale Rs. 150—225 (PS) will automatically rank seniors to you and your seniority if promoted will be reckoned only from the date of your promotion in future vacancy.

3. Your contention that, when you were promoted to officiate for 2 months against the leave vacancy of Shri Venkataraman, as per this office order No. M. 542/PI of 14th November, 1960, you should have been continued even after the expiry of the leave vacancy, and that Shri Varghese should have been reverted, is not correct, for the reasons stated in paragraph 2 above.

4. Your representation of 30th January, 1961 to GM (P) Madras is therefore withheld".

Aggrieved by the order, dated 27th November, 1959, the respondent moved the Mysore High Court (on the failure of his representations, to the hierarchy of Departmental Heads) for a writ of *certiorari* to quash the impugned order made by the appellant. By judgment dated 12th December, 1962, a Division Bench of the High Court quashed the order of reversion. The High Court observed that it was not necessary to express any opinion on the question whether the reversion of the respondent on the ground that his work was unsatisfactory amounted to a reduction in rank within the meaning of that expression occurring in Article 311(2) of the Constitution. But the High Court held that the reversion of the respondent amounted to a reduction in rank because he was reverted from the higher post to the lower post notwithstanding the fact that his juniors were still retained in the higher post. In reaching this conclusion, the High Court purported to follow the decision of this Court in *Madhav Laxman Vaikunthe v. State of Mysore*¹.

1. (1962) 1 S.C.J. 134: (1962) 1 S.C.R. 886: A.I.R. 1962 S.C. 8.

The Division Personnel Officer, Southern Railway, Mysore, obtained Special Leave from this Court to appeal against the order of the High Court.

It is contended by Mr Bishan Narain learned Counsel for the appellant, that the High Court misunderstood the ratio of the judgment of this Court in *Vaikunth's case*¹, that there is no right in a Government servant to promotion as of right, that the mere reversion of a Government servant from an officiating post to his substantive post, notwithstanding that his juniors are retained in the higher posts does not amount to a reduction in rank and the provisions of Article 311(2) are not attracted. On the other hand, it is contended by Mr S. K. Venkataranga Iyengar learned Counsel for the respondent, that the circumstances of the case clearly indicated that the reversion of the respondent amounted to a reduction in rank and since the procedure prescribed by Article 311 (2) was not complied with, the order of reversion was bad in law.

It may be taken to be settled by the decisions of this Court that since Article 311 makes no distinction between permanent and temporary posts, its protection must be held to extend to all Government servants holding permanent or temporary posts or officiating in any of them, but that protection is limited to the imposition of three major penalties contemplated by the Service Rules, viz, dismissal, or removal or reduction in rank.

The first of the cases which may be considered is the decision in *Parshotam Lal Dhingra v Union of India*,² commonly known as *Dhingra's case*. In this case, Das, C. J., who spoke for the majority, considered comprehensively the scope and effect of the relevant constitutional provisions, Service Rules and their impact on the question as to whether reversion of Dhingra offended against the provisions of Article 311(2). Dhingra was appointed as a Signaller in 1924 and promoted to the post of Chief Controller in 1950. Both these posts were in Class III service. In 1951, he was appointed to officiate in Class II service as Assistant Superintendent, Railway Telegraphs. On certain adverse remarks having been made against him, he was reverted as a subordinate till he made good his shortcomings. Then, Dhingra made a representation. Subsequently, the General Manager gave him notice reverting him to Class III appointment. It was this order which was challenged by Dhingra by a writ petition, in the High Court and, eventually, in this Court. The question for decision was whether the order of the General Manager amounted to reduction in rank within the meaning of Article 311(2) of the Constitution, and Dhingra was entitled to a reasonable opportunity to show cause against the order. This Court held that the reversion of an officiating officer to his substantive post did not attract the provisions of Article 311 (2) and that Dhingra was not entitled to the protection of that Article.

It is however true that even an officiating Government servant may be reverted to his original rank by way of punishment. It was therefore observed in *Dhingra's case*² at page 863

¹ Thus if the order entails or provides for the forfeiture of his pay or allowances or the loss of his seniority in his substantive rank or the stoppage or postponement of his future chances of promotion then that circumstance may indicate that although in form the Government had purported to exercise its right to terminate the employment or to reduce the servant to a lower rank under the terms of the contract of employment or under the rules in truth and reality the Government has terminated the employment as and by way of penalty.

One test for determining whether the termination of service was by way of punishment or otherwise is to ascertain whether under the Service Rules, but for such termination, the servant has the right to hold the post. It was held in *Dhingra's case*² that he was holding an officiating post and had no right under the rules of

¹ (1962) 1 S.C.J. 134 (1962) 1 S.C.R. 886, A.I.R. 1962 S.C. 8

² (1958) S.C.J. 217 (1958) S.C.R. 828 A.I.R. 1958 S.C. 36

the Railway Code to continue in it, that under the general law such appointment was terminable at any time on reasonable notice and the reduction could not operate as a forfeiture of any right, that the order of the General Manager visited him with no evil consequences and that the order therefore did not amount to a reduction in rank.

*Vaikunthe's case*¹ was relied upon by the High Court in support of its conclusion that the reversion of the respondent amounted to a reduction in rank. It is therefore necessary to scrutinize the facts of that case.

The appellant Vaikunthe, who held the rank of a Mamlatdar in the First Grade, and was officiating as District Deputy Collector, was alleged to have wrongly charged travelling allowance for 59 miles instead of 51 and was, as the result of a departmental enquiry, reverted to his substantive rank for three years and directed to refund the excess he had charged. He made a representation to the Government which was of no avail although the Accountant-General was of the opinion that the appellant had not over-charged and committed no fraud. Ultimately, the appellant was promoted to the Selection Grade but the order of reversion remained effective and affected his position in the Selection Grade. After retirement he brought a suit for a declaration that the order of reversion was void and for recovery of a certain sum as arrears of salary and allowances. The trial Court held that there was no compliance with the provisions of section 240 (3) of the Government of India Act, 1935, granted the declaration but refused the arrears claimed. Vaikunthe filed an appeal and the State a cross-objection. The High Court dismissed the appeal and allowed the cross-objection, holding that the order of reversion was not a punishment within the meaning of section 240 (3) of the 1935 Act.

This Court held that the matter was covered by the observations in *Dhingra's case*² and the tests of punishment laid down by this Court viz., (1) whether the servant had right to the rank or (2) whether he had been visited with evil consequences of the kind specified therein, and that the second test certainly applied. This Court concluded that Vaikunthe might or might not have the right to hold the higher post, but there could be no doubt that he was visited with evil consequences as a result of the order of reversion. It was there held:

"Mere deprivation of higher emoluments, however, in consequence of an order of reversion could not by itself satisfy that test which must include such other consequences as forfeiture of substantive pay and loss of seniority".

Since the requirement of section 240 (3) of the 1935 Act, which corresponds to Article 311 (2) of the Constitution, had not been found to have been fully complied with, the order of reversion was held to be void.

There was an important aspect of this decision which was lost sight of by the High Court. The impugned order there ran as follows:

"After careful consideration Government have decided to revert you to Mamlatdar for a period of three years.."

It was pointed out in *Dhingra's case*² that if the order of reversion entailed or provided for the forfeiture of the pay or allowances of the Government servant or loss of his seniority in his substantive rank or the stoppage or postponement of his future chances of promotion, then that circumstance might indicate that although in form the Government had purported to exercise its right to terminate the employment or to reduce the servant to a lower rank under the

1. (1962) 1 S.C.J. 134; (1962) 1 S.C.R. 886; A.I.R. 1962 S.C. 8.

2. (1958) S.C.J. 217; (1958) S.C.R. 828; A.I.R. 1958 S.C. 36.

terms of the contract of employment or under the rules, in truth and reality the Government had terminated the employment as and by way of penalty. At page 891, Sinha, C. J., who spoke for the Court, pointed out:

" he would have continued as a Deputy Collector but for the Order of the Government, dated 11th August, 1948, impugned in this case, as a result of the enquiry held against him, and that his reversion was not as a matter of course or for administrative convenience. *The Order, in terms, held him back for three years*. Thus his emoluments, present as well as future, was adversely affected by the Order aforesaid of the Government. In the ordinary course he would have continued as a Deputy Collector with all the emoluments of the post and would have been entitled to further promotion but for the set back in his service as a result of the adverse finding against him, which finding was ultimately declared by the Accountant General to have been under a misapprehension of the true facts. It is true that he was promoted as a result of the Government Order dated 26th March, 1951, with effect from 1st August, 1950. But that promotion did not entirely cover the ground lost by him as a result of the Government Order impugned in this case".

Again, at page 893, the learned Chief Justice pointed out:

" If the loss of the emoluments attaching to the higher rank in which he was officiating was the only consequence of his reversion as a result of the enquiry against him, the appellant would have no cause of action. But it is clear that as a result of the Order dated 11th August, 1948 (Exhibit 35), the appellant lost his seniority as a Mamlatdar, which was his substantive post. That being so, it was not a simple case of reversion with no evil consequences, it had such consequences as would come within the test of punishment as laid down in *Dhingra's case*".¹

Finally, it was pointed out:

" If the reversion had not been for a period of three years, it could not be said that the appellant had been punished within the meaning of the rule laid down in *Dhingra's case*.² It cannot be asserted that his reversion to a substantive post for a period of three years was not by way of punishment. From the facts of this case it is clear that the appellant was on the upward move in the cadre of his service and but for this aberration in his progress to a higher post, he would have, in ordinary course, been promoted as he actually was some time later when the authorities realised perhaps that he had not been justly treated...."

The real ground on which Vaikunth's reversion to his original post of Mamlatdar was held to be a violation of his constitutional guarantee was that his chances of promotion were irrevocably barred for a period of three years. If this aspect of *Vaikunth's case*³ is borne in mind, it will be found that there is no basic inconsistency between the decisions which have a bearing on the question as to in what cases reversion would amount to a reduction in rank.

Even so, it is contended by learned Counsel for the respondent that the real reason which operated on the mind of the appellant was that the respondent's work in his officiating capacity was unsatisfactory. Assuming that to be so, the question is whether his reversion to his original post, because he was found unsuitable for the higher rank to which he had been given the officiating chance, is valid.

In *State of Bombay v. F. A. Abraham*⁴ the respondent held the substantive post of Inspector of Police and had been officiating as Deputy Superintendent of Police. He was reverted to his original rank without being given an opportunity of being heard in respect of the reversion. His request to furnish him with reasons for his reversion was refused. Later, a departmental enquiry was held behind his back in regard to certain allegations of misconduct made against him in a confidential communication from the District Superintendent of Police to the Deputy Inspector-General of Police, but these allegations were not proved at the enquiry. The Inspector-General of Police, however, thereafter wrote to the Government that the respondent's previous record was not satisfactory and that he had been promoted to officiate as Deputy Superintendent of Police in the expectation that

1. (1958) S.C.J. 217; (1958) S.C.R. 828; A.I.R. 1962 S.C. 8.

A.I.R. 1958 S.C. 26

3. (1962) Supp. 2 S.C.R. 92; A.I.R. 1962

2 (1962) 1 S.C.J. 134; (1962) 1 S.C.R. 886; S.C. 794.

he would turn a new leaf. The High Court held, following its earlier decision in *M. A. Waheed v. State of Madhya Pradesh*¹ that if a person officiating in a higher post is reverted to his original post in the normal course, that is, on account of cessation of the vacancy or his failure to acquire the required qualification, the reversion did not amount to a reduction in rank but if he is reverted for unsatisfactory work, then the reversion would amount to a reduction in rank. This Court did not agree with the observations in *Waheed's case*¹ that when a person officiating in a post is reverted for unsatisfactory work, that reversion would amount to a reduction in rank. This Court took the view that the Government had a right to consider the suitability of the respondent to hold the position to which he had been appointed to officiate and that it was entitled for that purpose to make inquiries about his suitability and that that was all what the Government had done in that case.

Two more cases cited at the Bar now require to be considered. In *The High Court, Calcutta v. Amal Kumar Roy*² this Court held that the word 'rank' in Article 311 (2) referred to classification and not to a particular place in the same cadre in the hierarchy of service. The facts of the case were as follows. The respondent was a Munsif in the West Bengal Civil Service (Judicial). When the cases of several Munsifs came up for consideration before the High Court for inclusion in the panel of officers to officiate as Subordinate Judges, the respondent's name was excluded. On a representation made by him, the respondent was told by the Registrar of the High Court that the Court had decided to consider his case after a year. As a result of such exclusion, the respondent, who was then the senior-most in the list of Munsifs, lost eight places in the cadre of Subordinate Judges before he was actually appointed to act as an Additional Subordinate Judge. His case mainly was that this exclusion by the High Court amounted in law to the penalty of 'withholding of promotion' without giving him an opportunity to show cause. He prayed that a declaration might be made that he occupied the same position in respect of seniority in the cadre of Subordinate Judges as he would have done if no supersession had taken place and claimed arrears of salary, in a suit filed by him. The trial Court decreed the suit. On behalf of the appellants a preliminary objection was taken in this Court that the controversy raised was not justiciable. This Court held that there was no cause of action for the suit and the appeal must succeed.

It was there contended on behalf of the respondent that even though there might not have been any disciplinary proceedings taken against him, the effect of the High Court's order was that he was reduced by eight places in the list of Subordinate Judges and that in law amounted to a reduction in rank within the meaning of Article 311 (2) of the Constitution. At page 453 it was pointed out as follows:

"In our opinion, there is no substance in this contention because losing places in the same cadre, namely, of Subordinate Judges does not amount to reduction in rank, within the meaning of Article 311 (2). The plaintiff sought to argue that 'rank', in accordance with dictionary meaning, signifies 'relative position or status or place'. According to Oxford English Dictionary, the word 'rank' can be and has been used in different senses in different contexts. The expression 'rank' in Article 311 (2) has reference to a person's classification and not his particular place in the same cadre in the hierarchy of the service to which he belongs. Hence, in the context of the Judicial Service of West Bengal, 'reduction in rank' would imply that a person who is already holding the post of a Subordinate Judge has been reduced to the position of a Munsif, the rank of a Subordinate Judge being higher than that of a Munsif. But Subordinate Judges in the same cadre hold the same rank, though they have to be listed in order of seniority in the Civil List. Therefore, losing some places in the seniority list is not tantamount to reduction in rank. Hence, it must be held that the provisions of Article 311 (2) of the Constitution are not attracted to this case".

This decision therefore is authority for the position that losing some places in the seniority list is not tantamount to reduction in rank.

1. (1954) N.L.J. 305.

2. (1963) 1 S.C.R. 437: A.I.R. 1962 S.C. 1704.

The respondent relied upon the decision of this Court in *P. C. Wadhwa v. Union of India*¹. There, the appellant, a member of Indian Police Service and holding the substantive rank of Assistant Superintendent of Police (a post in the junior time scale of pay) in the State of Punjab, was promoted to officiate as Superintendent of Police, which was a post carrying a higher salary in the senior time scale, and posted as Additional Superintendent of Police. After he had earned one increment in that post he was served with a charge-sheet and before the enquiry, which had been ordered, had started, he was reverted to his substantive rank of Assistant Superintendent of Police, the ground suggested for reversion being unsatisfactory conduct. No details of the unsatisfactory conduct were specified and the appellant was not asked for any explanation. At the time when the appellant was reverted, officers junior to him in the Indian Police Service Cadre of the State were officiating in the senior scale. The order entailed loss of pay as well as loss of seniority and postponement of future chances of promotion.

It was held that the order of reversion made against the appellant was in effect a 'reduction in rank' within the meaning of Article 311(2) of the Constitution and inasmuch as he was given no opportunity of showing cause against the said order of reversion, there was violation of Article 311. On a consideration of the circumstances of the case, this Court reached the conclusion that the action of the Government reverting the appellant was *mala fide*. But that was not the sole ground on which the order of reversion was held to be bad.

After an examination of the legal position from the large body of rules to which reference was made, it was held that in so far as the Indian Police Service is concerned there was only one cadre that appointment to posts borne on that cadre were to be made by direct recruitment except to the extent of 25 per cent. of the senior posts which may be filled by promotion from the State Police Service. A special feature of the All India Services like the Indian Police Service, and the Indian Civil Service is that promotion is a matter of right. It was for this reason that this Court, by a majority pointed out at page 434 that

'In the case of those services there is no rule which specifically provides that an officer has to be freshly appointed to a post carrying a salary in the senior scale of pay

At page 435 it was said:

'In our opinion the whole scheme of the rules indicates that a person borne on the junior scale of pay has a right to hold a post on the senior scale of pay depending upon the availability of a post and his seniority in the junior scale of pay. If a person holding a post in the senior scale, though in an officiating capacity, is found to be unfit to hold that post action will have to be taken against him as required by rule 5 of Discipline and Appeal Rules because his reversion to a post in the lower scale would amount to reduction in rank within the meaning of Article 311 of the Constitution."

On a consideration of the circumstances of that case, it is clear that the decision itself proceeded on the basic fact that for members of All India Services like the Indian Police Service promotion was a matter of right and special considerations would have to be applied to them.

Now, in the light of the principles established by the above decisions, we may consider the respondent's case. The Southern Railway has two grades of Train Examiners. The respondent and one James Blazey were promoted from the lower grade to officiate in the higher grade. The respondent was shown at Item No. 2 and James Blazey at Item No. 3 in the promotion list. A note was appended to the order that the promotion of the respondent and Blazey were 'purely provisional subject to revision when seniority lists were drawn up for the Division'. By reason of the order dated 27th November, 1959, the respondent was reverted to the lower grade while Blazey was retained in the higher grade. The

case of the respondent is that Blazezy was junior to him and that since he was reverted while Blazezy was not, it would amount to a reduction in rank so far as he was concerned. It is plain that what he complains of is that he lost his seniority by reason of the retention of Blazezy in the officiating higher post.

The respondent's rank in the substantive post *i.e.*, in the lower grade, was in no way affected by this. In the substantive grade, the respondent retained his rank. It may also be added that he was visited with no penal consequences. It is no doubt true that it is not the form but the substance that matters, but once it is accepted that the respondent has no right to the post to which he was provisionally promoted, there can be no doubt that his reversion does not amount to a reduction in rank.

None of the decisions considered above lends support to the contention for the respondent.

It was finally argued that the procedure prescribed by rules 1609 to 1619 of the rules contained in the Indian Railway Establishment Code, Vol. I, were contravened. Rule 1609 reads:

"As a general rule, in no circumstances, should a gazetted railway servant be kept in ignorance for any length of time that his superiors, after sufficient experience of his work, are dissatisfied with him; where a warning might eradicate a particular fault, the advantages of prompt communication are obvious. On the other hand, the communication of any adverse remarks removed from their context is likely to give a misleading impression to the gazetted railway servant concerned. The procedure detailed in rule 1610 should, therefore be followed".

Rules 1609 to 1618 apply only to gazetted railway servants. The respondent is not a gazetted railway servant and there is no question of his claiming that he is entitled to the right given under the above rules.

Rule 1619 refers to non-gazetted railway servants. That rule provides that in general conformity with the principles laid down in the preceding rules applicable to Gazetted Railway Servants, a General Manager may frame detailed rules for the preparation, submission and disposal of confidential reports on non-gazetted railway servants. Learned Counsel for the respondent could not place before us those rules, if any.

The contentions raised by the respondent having been negatived, this appeal must succeed, and it is accordingly allowed, but, in the circumstances of the case, there will be no order as to costs.

V. K.

Appeal allowed;

THE SUPREME COURT OF INDIA. (Civil Appellate Jurisdiction)

PRESENT :—K N WANCHOO, J. C. SHAH AND S M. SIKRI.

Commissioner of Wealth-tax, West Bengal, Calcutta .. Appellant *

v.

The Imperial Tobacco Co., of India, Ltd .. Respondent.

Wealth tax Act (XXVII of 1957), section 17 (b)—Wealth tax—Reference—Re assessment—Information or change of opinion—Existence of divergent opinion among High Courts—Question of law arises for reference—Computation of net wealth—Contingencies—Deduction allowed for relevant years—Subsequent year—Deduction not allowed—Pendency of appeal—Notice of re-assessment for earlier years—Re-assessments completed after disallowing deductions

Income tax Act (XI of 1922), section 34 (1) (b)—Information or change of opinion—Question of law—Reference to be made.

The Department completed the assessment for the years 1957-58 and 1958-59, after allowing a deduction for contingencies, in the computation of the net wealth of the assessee. In March, 1960, the Officer completed the assessment for the year 1959-60 but disallowed the claim for deduction for contingencies. The Appellate Assistant Commissioner confirmed the order in November, 1960. Meanwhile notice of re-assessment proceedings were issued to the assessee in June, 1960, for the years 1957-58 and 1958-59 and re-assessments were made by the Department, disallowing the deductions claimed for contingencies. But the Tribunal allowed the appeal preferred by the assessee and held the re-assessment proceedings were not valid on the basis that the Officer had no information and it was merely a change of opinion. The Tribunal pointed out that if the Officer had issued the notices for re-assessment after the dismissal of the appeal for the year 1959-60, that could have supported the re-assessment on the basis of information. The Tribunal and the High Court declined to state a question of law. The Department, with Special Leave, appealed.

Held, that on the existence of a divergence of opinion among the High Courts as to the meaning of the word "information" in section 34 (1) (b) of the Income-tax Act, 1922 the language of which is *pari materia* with the language of section 17 (b) of the Wealth tax Act, a question of law did arise as to the interpretation of the word and the same should have been referred.

It is now settled that "information" in section 34 (1) (b) of the Income tax Act included information as to the true and correct state of law, and so would cover information as to relevant judicial decisions and that such information for the purpose of the section need not be confined only to cases where the Income-tax Officer discovers as a fact that income has escaped assessment.

* But there is divergence of opinion among the High Court whether the basis of re-assessment proceedings taken by the Officer, was merely change of opinion and not information.

Appeals by Special Leave from the Judgment and Order dated the 15th February, 1965, of the Calcutta High Court in Matters Nos. 231 and 232 of 1964.

R. M. Hazrnavis, Senior Advocate (N. D. KarKhantis, R. H. Dhebar and R. N. Sachthey, Advocates with him), for Appellant.

A. K. Sen, Senior Advocate (T. A. Ramachandran, Advocate and J. B. Dadachanji, O. C. Mathur and Ravinder Narain, Advocates of M/s. J. B. Dadachanji & Co., with him), for Respondent.

The Judgment of the Court was delivered by

Wanchoo, J.—These two appeals by Special Leave arise out of two applications by the appellant to the Income tax Appellate Tribunal for reference to the High Court of a question of law, which was formulated as follows :—

"Whether on the facts and in the circumstances of the case, the Tribunal was right in holding that the re-assessment proceedings under section 17(b) of the Wealth tax Act were not validly initiated and in setting aside the same."

The facts which led to the applications for reference are briefly these. The respondent submitted wealth-tax returns for the years 1957-58 and 1958-59. For the year 1957-58 the respondent claimed that an amount of Rs. 51 lakhs and odd being provision for taxation and another amount of Rs. 37 lakhs and odd being provision for contingencies, being ascertained liability, should be allowed as deduction from the total wealth. For the year 1958-59, the respondent claimed Rs. 31 lakhs and odd being provision for contingencies as ascertained liability as deduction from the total wealth.

Assessment for the year 1957-58 was completed on 30th December, 1957, and the Wealth-tax Officer accepted the contention of the respondent and allowed the claim for deduction. Subsequently the Commissioner of Wealth-tax by his order dated 29th December, 1958, passed under section 25 (2) of the Wealth-tax Act* (XXVII of 1957), (hereinafter referred to as the Act), disallowed the deduction of Rs. 51 lakhs and odd being the provision for taxation for the assessment year 1957-58. The order of the Wealth-tax Officer allowing deduction for contingencies for the assessment year 1957-58 however stood. The assessment for the year 1958-59 was completed on 9th December, 1958, and deduction was allowed for contingencies only. It may be added that we are not concerned in the present appeals so far as deduction for provision for taxation is concerned. On 22nd March, 1960, the Wealth-tax Officer completed the assessment of the respondent for the year 1959-60 and disallowed the claim for deduction of the provision for contingencies. On 2nd June, 1960, the Wealth-tax Officer issued two notices under section 17 (b) of the Act for re-assessment of net wealth for the years 1957-58 and 1958-59. On 24th September, 1961, orders of re-assessment under section 16 (3) read with section 17 (b) of the Act were passed in respect of the assessment years 1957-58 and 1958-59 and by these orders the amounts which had been formerly allowed as deduction with respect to contingencies were included in the total wealth of the respondent. The respondent then went in appeal against the two re-assessment orders and the Appellate Assistant Commissioner sustained the decision of the Wealth-tax Officer with respect to the re-assessments in question. The case of the respondent was that the Wealth-tax Officer had no information on the basis of which he could proceed to re-assess the net wealth of the respondent and in this connection reliance was placed on the words "in consequence of any information in his possession" appearing in section 17 (b) of the Act.

The respondent then went in appeal to the Appellate Tribunal and his contention there was that the issue of notices under section 17 (b) of the Act was invalid as it was based on a mere change of opinion on the part of the Wealth-tax Officer, as at that time there was no information in the possession of the Wealth-tax Officer which could lead him to believe that the net wealth chargeable to tax had escaped assessment. It was contended that such information must be information which came into possession of the Wealth-tax Officer subsequent to the making of the original assessment and that the information must lead him to believe that income chargeable to tax had escaped assessment. The Tribunal accepted this contention of the respondent. It may be pointed out that the assessment made by the Wealth-tax Officer for the year 1959-60 was taken in appeal to the Appellate Assistant Commissioner by the respondent and the respondent's appeal was dismissed in November, 1960. The Tribunal pointed out that if the Wealth-tax Officer had waited till after the decision of the Appellate Assistant Commissioner about the assessment for the year 1959-60 and then issued notices there would have been sufficient information for the purpose of section 17 (b) with the Wealth-tax Officer to authorise him to issue notice thereunder, but as the Wealth-tax Officer issued the notices in June, 1960, before that appeal was decided, it was only a case of change of opinion by the Wealth-tax Officer which did not justify issue of notices under section 17 (b). The Tribunal also pointed out that the Departmental Representative was specifically asked what the information was upon which the Wealth-tax Officer came to the conclusion that taxable wealth had escaped assessment. The Departmental Representative was unable to point to any specific information which came into the possession of the

Wealth tax Officer and which could lead him to issue the notices in question. The Tribunal therefore held that the re-assessment proceedings under section 17 (b) for the years 1957-58 and 1958-59 were not validly initiated and set them aside. Thereupon the appellant applied to the Tribunal for making references under section 27 (1) of the Act. The Tribunal rejected the applications. The appellant then applied to the High Court under section 27 (3) of the Act for direction to the Tribunal to state a case. The High Court however rejected the applications summarily. Thereupon the appellant applied to this Court for Special Leave which was granted, and that is how the matter has come before us.

The main contention that has been urged on behalf of the appellant before us is that there is divergence of opinion among the High Courts on the question as to what constitutes "information" for the purpose of section 34 (1) (b) of the Indian Income-tax Act XI of 1922, (hereinafter referred to as the Income tax Act). That section is *pari materia* with section 17 (b) of the Act and therefore a question of law did arise which should have been referred to the High Court for its decision on the question raised by the appellant. Reliance in this connection is placed on the decision of this Court in *Maharajkumar Kamal Singh v Commissioner of Income tax, Bihar*¹, where this Court held that

'the word "information" in section 34 (1) (b) included information as to the true and correct state of the law, and so would cover information as to relevant judicial decision.

A further question was raised in that case, namely

"Whether it would be open to the Income-tax Officer to take action under section 34 (1) on the ground that he thinks that his original decision in making the order of assessment was wrong without any fresh information from an external source or whether the successor of the Income-tax Officer can act under section 34 on the ground that the order of assessment passed by his predecessor was erroneous."

That question was not decided by this Court in that case, though this Court pointed out that in construing the scope and effect of section 34, the High Courts had expressed divergent views on the point. It is urged on behalf of the appellant that the precise question left undecided by this Court in *Maharajkumar Kamal Singh's case*¹, arises in the present case, and as there are divergent views taken by the High Courts on that question, a question of law did arise on the order of the Appellate Tribunal and therefore the Tribunal should have made a reference.

In *Commissioner of Income tax, Bombay v Sir Mohamed Yusuf Ismail*², it was held by the Bombay High Court as far back as 1943 that under section 34 a mere change of opinion on the same facts or on a question of law or the mere discovery of a mistake of law is not sufficient information within the meaning of section 34 and that in order to take action under section 34 there must be some information as a fact which leads the Income tax Officer to discover that income has escaped or has been under assessed.

The same view was taken in a later case by the Nagpur High Court in *Income tax Appellate Tribunal, Bombay v B P Byramji & Co*³, where it was again emphasised that a mere change of opinion by the Income tax Officer is no ground for taking action under section 34.

Further in *Bhumraj Panalal v Commissioner of Income tax, Bihar*⁴ it was held by the Patna High Court that

'An order of assessment made after investigation by a particular officer should not at his sweet will and pleasure be allowed to be revised merely because he changed his opinion and that there must exist something either suppressed by the assessee or a fact or a point of law which was inad-vertently or otherwise omitted to be considered by the Income tax Officer, before he can proceed to act under section 34, and a mere change of opinion on the same facts and law is not covered by that section.'

¹ t (1959) S.C.J. 230 (1959) 1 M.L.J. (S.C.)
92 (1959) 1 An.W.R. (S.C.) 92 (1959) 1
S.C.R. (Supp.) 10
² (1944) 12 I.T.R. 8 I.L.R. (1944) Bom.
230 46 Bom. L.R. 108 A.I.R. 1944 Bom. 160

3 (1946) 14 I.T.R. 174 I.L.R. (1946) Nag.
387 (1946) N.L.J. 25 A.I.R. 1946 Nag. 188
4 (1957) 32 I.T.R. 289 I.L.R. (1957) 36
Pat. 920 A.I.R. 1957 Pat. 638

The appellant on the other hand relies on some recent decisions which show that there is some divergence of opinion in the High Courts on this question. In *Salem Provident Fund Society Limited v. Commissioner of Income-tax, Madras*¹, the Madras High Court held that :

"Information for the purpose of section 34 need not be wholly extraneous to the record of the original assessment. A mistake apparent on the face of the order of assessment would itself constitute 'information'; whether someone else gave that information to the Income-tax Officer or whether he informed himself was immaterial."

In *Commissioner of Income-tax v. Rathinasabhapathy Mudaliar*², the Madras High Court again held that :

"the discovery of the Income-tax Officer after he had made the assessments that he had committed an error in not including the minor's income in the father's assessment was 'information' obtained after the assessment, and even though all the facts were in the original records, the case was covered by section 34 (1) (b) of the Income-tax Act and the re-assessment was not invalid, and this was not a case of mere change of opinion on the same facts but a case of getting information that income had escaped assessment."

In *Canara Industrial and Banking Syndicate Limited v. Commissioner of Income-tax, Mysore*³, the Mysore High Court held that :

"If income had escaped assessment owing to the failure of the Income-tax Officer to understand the true implication of a notification, and the Income-tax Officer later on finds that on a correct interpretation of the notification the income was liable to be assessed, he can take proceedings under section 34 for assessment of such income; the word 'information' in section 34 is wide enough to apply to such a case."

The last case to which reference is made is *Asghar Ali Mohammad Ali v. Commissioner of Income-tax*⁴ wherein the Allahabad High Court held that :

"the word 'information' used in the provision covers all kinds of information received from any person whatsoever or in any manner whatsoever; all that is required is that the Income-tax Officer should learn something *i.e.*, he should know something which he did not know previously."

It was further held that

"if there is information leading to the belief that income has escaped assessment, the mere fact that this information has resulted in a change of opinion will not make section 34 inapplicable. A change of opinion is not sufficient for initiating proceedings under section 34, only when such change of opinion is the result of a different method of reasoning, and not based on 'information'."

It does appear that some High Courts at any rate are taking the view that a change of opinion by the Income-tax Officer in certain circumstances will be sufficient for the purpose of section 34 (1) (b) and will justify the issue of a notice thereunder. It may be added that after the decision of this Court in *Maharajkumar Kamal Singh's case*⁵, it is now settled that :

"information in section 34 (1) (b) included information as to the true and correct state of law, and so would cover information as to relevant judicial decisions."

and that such information for the purpose of section 34 (1) (b) of the Income-tax Act need not be confined only to cases where the Income-tax Officer discovers as a fact that income has escaped assessment. To that extent the decision of the Bombay High Court in *Sir Mohamed Yusuf Ismail*⁶, has been overruled. That is why the Appellate Tribunal stated in its decision that if the notices in the present case had been issued after the decision of the Appellate Assistant Commissioner in the appeal from the assessment for the year 1959-60, there would have been information in possession of the Wealth-tax Officer to justify him in issuing notices under section 17 (b) of the Act. But in the present case the Wealth-tax Officer issued notices before that decision was known to him and the question is whether in the circumstances, in view

1. (1961) 42 I.T.R. 547.

2. (1964) 51 I.T.R. 204.

3. (1964) 51 I.T.R. 479.

4. (1964) 52 I.T.R. 962.

5. (1959) S.C.J. 230 : (1959) 1 M.L.J. (S.C.) :

92 : (1959) 1 An. W.R. (S.C.) 92 : (1959) 1 S.C.R. (Supp.) 10.

6. I.L.R. (1944) Bom. 230 : 46 Bom. L.R.

108 : (1944) 12 I.T.R. 8 : A.I.R. 1944 Bom. 160.

of the later decisions of the High Courts to which we have referred, a question of law arose or not. The language of section 17 (b) of the Act is *pari materia* with the language of section 34 (1) (b) of the Income-tax Act and therefore the decisions under section 34 (1) (b) would be relevant in construing the scope and effect of section 17 (b) of the Act. There does appear to be divergence of opinion among the High Courts as to the meaning of the word "information" in section 34 (1) (b) of the Income-tax Act, and in view of that divergence we are of opinion that a question of law did arise in the present case as to the interpretation of the word "information" in section 17 (b) of the Act and should have been referred by the Tribunal.

We, therefore, allow the appeals, set aside the order of the High Court and direct the Tribunal to state a case referring the question of law arising in these cases in the form suggested by the appellant. The Tribunal will be free to decide whether to refer the matter to the High Court under section 27 (1) or to this Court under section 27 (3-A) of the Act. Costs of this Court will abide the result of the reference.

V.S.

Appeals allowed.

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THE DEFINITION OF A HINDU.

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The task of defining for purposes of law who is and who is not a Hindu is proverbially difficult.¹ The statutes which go to make up our so-called "Hindu Code" take a despairing stand. A person may be a Hindu for this purpose though he is not a Hindu by religion, *i.e.*, even if he fails to fulfil a religious test, such as the one we are going to discuss below—and if he is an infant he may be a Hindu if he is brought up as a member of a tribe, community, group or family to which his Hindu parent belongs or belonged (see Hindu Marriage Act, 1955, S. 2).^{*} The real test, for purposes of the codified law, is whether the individual in question is a Muslim, Christian, Parsi or Jew, and if we assume for purposes of discussion that there is no problem about *these* definitions we can determine that the individual is a Hindu by learning that he is not one of the others (see Hindu Marriage Act, 1955, s. 2 (1) (c)).

The uncoded law is sufficiently vast in extent. There the old problems about the definition of a Hindu remain. An intriguing question is raised in the *Satsang case*, namely *Shastri Yagnapurshdasji v. Muldas Bhundardas Vaishya*². The judgment, which is that of Gajendragadkar, C. J., delivered shortly before he gave up his seat as Chief Justice, is remarkable in many ways. The present writer is not used to praising (a man's deeds are usually sufficient praise for him, and if they fail he himself seldom needs others to help him out), and there is seldom any point in writing an article to praise a judgment which is its own best advertisement; but this case is remarkable even in this, that it deserves to be brought to the attention of people who do not read the law reports for pleasure, who have use for law reports only as tools of a trade, and even those who have given up using law reports for any purpose.

The facts of the *Satsang case*² can be abbreviated for our present purpose. Under a succession of Bombay statutes Harijans were authorised to enter into Hindu public temples and worship there as other Hindus already were. The members of the Swaminarayan sect claimed that their temples did not come within the scope of the Bombay statutes, as the Satsangis, *i.e.*, the initiated members of the Swaminarayan sect, were not Hindus, and their temples were not Hindu temples. It would have been possible to decide the issue by merely showing from evidence of the history and doctrines of the Swaminarayan sect (as was actually done) that the sect was a reforming Hindu sect. The founder was a *sanyasi* who believed, no doubt rightly, that the Vaishnava teachers of the Vallabhacharya *sampradaya* had become corrupt, and that worship of the God Vishnu should be taught to his disciples in association with certain undertakings on their part to live in holiness, avoiding lying, theft, adultery, intoxication and animal food. The devotees of the sect worshipped the Lord Krishna, their prayer being *Sri Krishnah saranam mama* ('Great Krishna is my refuge'). The sect believes in the sanctity of the Vedas, and have an organisation for the purpose of initiating disciples and maintaining a continuity of faith and worship. The sect is important in the limits of the former Bombay Presidency. It was well known in the time of that indefatigable enquirer into Indian religion, Sir M. Monier Williams who personally conducted investigations into its history and beliefs, and the Bombay Gazetteer gives substantial information about them. It was obvious that the Satsangis were Hindus, especially in an age like the present when Sikhs, Jains,

1. On Hinduism, conversion etc. see Derrett, *Introduction to Modern Hindu Law* (Oxford University Press, 1963) § 17.

* See also Hindu Succession Act, 1956, S. 2, Hindu Minority and Guardianship Act, 1956 S. 3 and Hindu Adoption and Maintenance Act, 1956, S. 2. Editor.

2. (1966) 2 S.C.J. 502 : A.I.R. 1966 S.C. 1119.

Buddhists and Lingayats, are treated for legal purposes (with some exceptions)¹, as 'Hindus'. True the Jains of Bombay had for a time claimed exemption from the Harijan Temple entry legislation, because the word 'Hindu' could not then be held to include Jaina for this purpose an error which was later rectified. But Satsangis, as the members of our sect are called, were as evidently Hindus as Sikhs and Lingayats, or Arya Samajists or Brahmo Samajists.

The case could have been disposed of on this footing, without reference to the definition of Hindu, but the manner in which the case had been argued left it open to go further. It was alleged that the Satsangis were not Hindus and their temples were not Hindu temples because the founder himself was worshipped, Swaminarayan being a deity for the sect, and because Muslims and Parsis were admitted to the sect and obtained *diksha* (initiation) within it. The Supreme Court judgment does not mention that these were the non Hindus who became members but the fact is mentioned in the judgment in the Court below (*State of Bombay v Shastri Yagna Purushadasji*²). The further point that women also received *diksha* is not worth pursuing, and was more or less neglected. It is common ground that the sect embraces many castes, Brahmin and non Brahmin alike, but this is a common characteristic of Vaishnava sects. The presence of Muslims and Parsis within the sect however raises curious and important problems. The Supreme Court has now held that the temples are Hindu temples, though they may be used by Muslim and Parsi worshippers.

The special features of the judgment in the Supreme Court are these —

(1) It relies on no judicial authority,

(2) It relies on a legislative precedent (the Hindu Code) but only in a glancing or indirect manner

(3) It relies on established authorities who discuss the Hindu religion, but discuss it in a particular modern and enlightened manner,

(4) It relies also on the text of the *Bhagavadgita*, thus for the first time (?) making this a judicially recognised authority,

(5) and it relies on a view of the purpose and spirit of the Constitution with reference to religion which is not by any means original, but which deserved to be stated in this connection.

The judgment can serve as the adieu of the learned Chief Justice to his profession, to a career in which a desire for social justice and an interest in the personal law of the Hindus have manifested themselves markedly and for long. Chief Justice Gajendragadkar was born in a family in which *sastri* learning was traditional, and the development from the old fashioned dyed in the wool Sanskrit culture in which people of his generation and caste were born, through the depressing experience of administering the Anglo Hindu law with its bogus Hinduism and distorted and antiquated rules, up to the heavy responsible task of administering Indian law to an Indian people in contexts in which they insist upon being seen as Indians and not as the artificial creature which is the Anglo Indian legal Indian, this development is one which the observer who has eyes to see can mark with admiration. For this life story and this intellectual pilgrimage is not merely that of the present Vice Chancellor of Bombay University, but of his generation, whether they are conscious of the calm and peaceful manner in which the distasteful litigation is laid to rest are a *quietus* for a long dying stage in the history of Hinduism itself. Readers will agree that the following passage makes delightful and thought provoking reading.

"It may be conceded, that the genesis of the suit is the genuine apprehension entertained by the appellants but as often happens in these matters, the said apprehension is founded on superstition, ignorance and complete misunderstanding

¹ For a purely social purpose Buddhist may not be included in 'Hindu' *Narayan Wakta Karwade v Punjabrao Hukam* (1958) 60 Bom.L.R. 776 (representation of Scheduled Castes)

² (1959) 61 Bom L.R. 700, 707 I.L.R. (1960) Bom 467

of the true teachings of Hindu religion and of the real significance of the tenets and philosophy taught by Swaminarayan himself.

'While this litigation was slowly moving from Court to Court, mighty events of a revolutionary character took place on the national scene. The Constitution came into force on the 26th January, 1950, and since then, the whole social and religious outlook of the Hindu community has undergone a fundamental change as a result of the message of social equality and justice proclaimed by the Indian Constitution. . . . The solemn promise enshrined in Article 17 has been gradually, but irresistibly, enforced by the process of law assisted by enlightened public conscience. As a consequence, the controversy raised before us in the present appeal has today become a matter of mere academic interest. We feel confident that the view which we are taking on the merits of the dispute between the parties in the present appeal not only accords with the true legal position in the matter, but it will receive the spontaneous approval and response even from the traditionally conservative elements of the Satsang community whom the appellants represent in the present litigation. In conclusion, we would like to emphasise that the right to enter temples which has been vouchsafed to the Harijans by the impugned Act in substance symbolises the right of Harijans to enjoy all social amenities and rights, for let it always be remembered that social justice is the main foundation of the democratic way of life enshrined in the provisions of the Indian Constitution.'

The Harijans wanted to enter the temples not because they could not worship Lord Krishna outside them, but because their exclusion was a social distinction which the present age can no longer justify. His Lordships words are therefore, apt. In so far as there was a social discrimination against them this is removed. The result is not that the Harijans can approach nearer to the image than other Hindus. His Lordship points out that the Harijans are entitled only to such rights of *darsana* as were possessed by non-Harijans and interference with the routine of the temple and the worship of the image by the *pujaris* is not contemplated.

In order to determine how a sect which worshipped the historical individual Swaminarayan, and which admitted Muslims and Parsis to *diksha* could be a Hindu sect, it was desirable to cover the broad history of Hinduism, and this is elaborately done with ample citations from the works of Dr. S. Radhakrishnan, from Max Mueller and from B. G. Tilak. The account starts with the significant fact that 'Hindu' is essentially a geographical and political term, indicating a nationality, not a religious denomination. The absence of creed and dogma is emphasised. No Hindu can cease to be a Hindu for unorthodoxy, a fact to which we shall return. As a matter of history "the Hindu thinkers reckoned with the striking fact that the men and women dwelling in India belonged to different communities, worshipped different gods, and practised different rites." The process of assimilation and adaptation which the thought and beliefs of the Hindus have undergone are noted. The development of the Hindu religion "has always been inspired by an endless quest of the mind for truth based on the consciousness that truth has many facets." There follows a reference to monist idealism and the different categories of this all based theoretically on the same scriptures. The six *darsanas* accept the doctrine of world rhythm. Most accept the authority of the Vedas. All systems of philosophy accept the doctrine of rebirth and pre-existence. Many gods are worshipped. Saints arose from time to time to remove from Hindu thought and practice elements of corruption and superstition. As a result of the teachings of Ramakrishna and Vivekananda Hindu religion flowered into its most attractive, progressive and dynamic form. The ultimate goal of humanity is *moksha*, absorption, assimilation with the infinite. How is this to be attained? Some emphasise *jnana*, others *bhakti*, others again *karma* (performance of duties). "It would be inappropriate to apply the traditional tests in determining the extent of the jurisdiction of Hindu religion. It can be safely described as a way of life based on certain basic concepts to which we have already referred." Arnold Toynbee did well to recognise the essential fact that Hinduism as a religion recognises that there is more than one valid approach to truth and salvation.

1. Worship of Swaminarayan, the founder, is therefore nothing other than a recognition that the Lord reincarnates himself when *adharma* is in the ascendant. For what does the *Gita* say (IV 7) ?

यदा यदा हि धर्मस्य ग्लानिर्भवति, भारत ।

अभ्युत्थानमधर्मस्य तदात्मानं सृजाम्यहम् ॥ ७ ॥

Whenever there is decay of righteousness, O Bharata, and exaltation of unrighteousness, then I create Myself (and one must continue)

परित्राणाय साधूनां विनाशाय च दुष्कृताम् ।

धर्मसंस्थापनार्थाय स भवामि युगे युगे ॥ ८ ॥

For protection of the good, and destruction of evildoers, for the sake of firmly establishing righteousness I am born from age to age

As the author of the *Gita* knew perfectly well the duties of protecting the good and destroying the evil were the characteristic duties of the king, and so also was the duty of establishing *dharma*. Lord Krishna is therefore declaring that his incarnations have the royal stamp and purpose. The State is honned we shall add, in Hindu eyes to perform these functions and it is inconceivable that the State should fail to recognise the propriety of belief and worship directed to this end. Swami narayan was unquestionably a purifier of *dharma* and an establisher of *dharma* and that is why his sect has flourished. Naturally his followers, being Hindus are entitled to erect a temple to house his image and to accord their founder divine honours, and, whatever rival sects may think the State is bound to accept this so long as Hindu principles must be the test—and in determining whether a temple is a Hindu temple no other principles can be referred to. The State is (we may comment) not a secular state in that it ignores or is indifferent to religion but a state like that of ancient India in which the balance between all religions is faithfully kept and righteousness sought to be enforced consistently with the welfare of all. This is a very special (and Hindu) view of secularism.

The admission of Muslims and Parsis was certainly a problem at first sight. It was not contended that the Muslims and Parsis were converted. Had that contention been made we should have been back on familiar ground. No formal conversion is necessary (*Ramayya v Josephine*).¹ If an individual professes the Hindu religion, aiming to be identified with Hindus a presumption that he is governed by Hindu law arises (*Mokka v Ammakutti*).² But here the Satsangis of Muslim and Parsi origin remained Muslims* and Parsis and presumably must be governed by their respective personal laws and not by Hindu law. Hinduism admitted them to be members of the sect, but their conversion to Hinduism generally or for purposes of application of Hindu law was not contemplated. This is how the learned Chief Justice puts it (page 1184).

It is true that the Swaminarayan sect gives Diksha to the followers of other religions and as a result of such initiation they become Satsangis without losing their character as the followers of their own individual religions. This fact, however, merely shows that the Satsang philosophy preached by Swaminarayan allows followers of other religions to receive the blessings of his teachings without insisting upon their forsaking their own religions. The fact that outsiders are willing to accept Diksha or initiation, is taken as an indication of their sincere desire to absorb and practise the philosophy of Swaminarayan and that alone is held to be enough to confer on them the benefit of Swaminarayana's teachings. The fact that the sect

1. AIR 1937 Mad 172

2. (1927) 54 M.L.J 174. I.L.R. 51 Mad 1 223 39 (FB)

* While it may be possible to regard a Muslim Satsangi from the Hindu viewpoint as a Hindu for purposes of entry into Hindu Public Temples and worship under the Bombay Statute it is doubtful whether he can still be a Muslim for purposes of Muslim law in view of Islam not permitting image worship (in the instant case of Swaminarayan)—Editor

does not insist upon the actual process of proselytising on such occasions, has really no relevance in deciding the question as to whether the sect itself is a Hindu sect or not."

Thus Hinduism believes in various paths leading to one goal. This was true of Indians now called Hindus. The coming of other faiths, including those who adopt an exclusive attitude to salvation, did not alter the position so far as Hinduism was concerned. The special adjusting and assimilating quality of Hinduism, which turns out on reflection to be nothing other than a function of those unique adaptive and assimilative qualities of Indians which no other nation can rival, has now been given voice in appropriate litigation before the Supreme Court. The learned Chief Justice again quotes the *Gita* (IX. 23)¹

येऽप्यन्यदेवताभक्ता यजन्ते श्रद्धयाऽन्विताः ।

तेऽपि मामेव, कौन्तेय, यजन्त्यविधिपूर्वकम् ॥ १३ ॥

"Even the devotees of other Deities, who worship full of faith, they also worship Me, O son of Kunti, though their method is irregular."

One is reminded of a judgment in Madras by Chandrasekhara Iyer, J., which has always been a favourite with this writer, but which has been somewhat disliked by those, who, apparently, had an inadequate view of what Hinduism in the broad really means. This is *Kolandai v. Gnanavaram*². Here it was held that a Hindu might validly alienate family property for the purposes of a Church, for a broad tolerance was consistent with traditional Hinduism. It is a comfort to see that the Islamic rule whereby gifts and bequests in *wakf* cannot be made by non-Muslims has been abolished in India (see *Syed Edulla v. Madras State Wakf Board*)³. It is now possible for Hindus to dedicate property to a Muslim religious charity, and for this to be valid both at Hindu law and at Islamic law, at least as the latter is administered in India. This of course violates the *karma-kanda* aspect of Hinduism.

But have not many such violations occurred? Temple-entry, prohibition of *devadasis*, prohibition of animal-slaughter for sacrifices, prohibition of *sati*, and many such inroads upon religious practices at once come to mind: One could write a long list, not least prominent in which would be inroads upon Hindu law made by the 'Hindu Code.' The Constitution itself requires that untouchability shall be eliminated, and this was, whatever else it was, unquestionably founded on religious premises.

The answer to all this is given, by the way, in this judgment itself. Hinduism regards the various paths to salvation as "not only compatible with each other, but.... complementary." This age sees, as is only natural when agricultural religion and ethics are losing their hold, a decline in the *karma-kanda*. The paths of *jñāna* and pre-eminently of *bhakti* are much more frequented. From ancient, indeed very ancient, times it has been acknowledged that the merit earned by sacrifices, or by good works, by performing and abstaining, by purifications and asceticism, cannot be greater than that earned by devotion, mental concentration, sincerity. It is curious that exactly the same contrast in paths, and the same prophetic preference for the ethical, the reflective, and the spiritual is to be seen in the religious development of the Jews—and it remains in the balance which survives in Christianity between salvation by faith alone, and salvation by faith demonstrated notably in works.

We can turn to the *Gita* again. Faith in Lord Krishna, who, by his own definition, is the goal of all sincere worshippers of deities by whatever name known and worshipped, is sufficient for the attainment of *moksha*, the goal of Hinduism as correctly noted in our judgment pp.1130-1. Hinduism accepts all religions which have

1. The translation given by the learned Judge (p. 1135, col. 1) takes a different sense from the text and is somewhat free. See P.V. Kane, *Hist. of Dharmasastra*, III, p. 881.

2. (1943) 2 M.L.J. 664 : A.L.R. 1944 Mad 156.

3. (1966) 1 M.L.J. 17.

the *bhakti* element as consistent with itself, and the *bhakti* emotion is recognised as Hindu, in whatever breast it may be identified. In comparison with this path the paths of *yoga*, *jnana* and *karma*, are neither higher nor lower, but merely alternatives. Legislation in keeping with social movements reflects the public's choice, conscious or unconscious of the *bhakti* alternative, and so far as public life in the twentieth century is concerned it is that alternative which obtains recognition and protection.

In a sense the State has put its weight behind the *Gita* itself. Numerous verses could be quoted to expound the point of view, but a few will suffice.

यत्करोषि यद्भ्रासि यज्जुहोषि ददासि यत् ।

यत्तपस्यसि, कौन्तेय, तत्कुरुष्व मदर्पणम् ॥ ९, २७ ॥

Whatsoever thou doest, whatsoever thou eatest, whatsoever thou offerest, whatsoever thou givest, whatsoever thou doest of austerity, O Kaunteya !, do thou that as an offering to Me

शुभाशुभफलैरेव मोक्ष्यसे कर्मबन्धने ।

सन्यासयोगयुक्तात्मा विमुक्तो मामुपैष्यसि ॥ २८ ॥

Thus shalt thou be liberated from the bounds of action, yielding good and evil fruits, thyself harmonised by the yoga of renunciation, thou shalt come unto Me when set free

समोऽह सर्वभूतेषु, न मे द्वेष्योऽस्ति न प्रियः ।

ये भजन्ति तु मां भक्त्या स्युः ते तु चाप्यहम् ॥ २९ ॥

The same am I to all beings, there is none hateful to Me nor dear. They verily who worship Me with devotion, they are in Me, and I also in them

अपि चेत्सुदुराचारो, भजते मामनग्नभाक् ।

साधुरेव स मन्तव्यः, सम्यग्व्यवसितो हि स ॥ ३० ॥

Even if the most sinful worship Me with undivided heart, he too must be accounted righteous, for he hath rightly resolved

क्षिप्रं भवति धर्मात्मा, शश्वच्छान्तिं निगच्छति ।

कौन्तेय, प्रतिजानीहि (नामि) न मे भक्तः प्रणश्यति ॥ ३१ ॥

Speedily he becometh dutiful and goeth to eternal peace, O Kaunteya ! know thou (or I promise) that My devotee perisheth never

मा हि पार्थ व्यपाश्रित्य येऽपि शूरा पापयोनयः ।

स्त्रियो वैश्यास्तथा शूद्रा, तेऽपि यान्ति परा गतिम् ॥ ३२ ॥

They who take refuge with Me, O Partha ! though of the womb of sin, women, *vaisyas*, even *sudras*, they also tread the highest Path

ममना भव भद्रं कुरु मद्यात्मा मा नमस्कुरु ।

मामेवैष्यसि युक्त्वैवमात्मानं मत्परायण ॥ ३४ ॥

On Me fix mind, be devoted to Me, sacrifice to Me, prostrate thyself before Me, harmonised thus in self thou shalt come unto Me having Me as thy supreme goal. Krishna is 'transfigured' and manifests a 'form' which reveals his nature

न वेदयज्ञाध्ययनेन दानेन

च क्रियाभिर्न तपोभिरुग्रैः ।

एवरूपं शक्यं अहं नृलोके

द्रष्टुं त्वदन्येन, कुरुप्रवीर ॥ ११, ४८ ॥

Nor sacrifice, nor Vedas, alms, nor works;
Nor sharp austerity, nor study deep,
Can win the vision of this awful Form;
Foremost of Kurus ! thou alone hast seen.

नाहं वेदैर्न तपसा न दानेन न चेज्यया ।

शक्य एवंविधो द्रष्टुं, दृष्टवानसि मां यथा ॥ ५३ ॥

Nor can I be seen as thou hast seen Me by Vedas nor by austerities, nor by alms nor by sacrifices.

भक्त्या त्वनन्यया शक्य अहमेवंविधोऽर्जुन ।

ज्ञातुं द्रष्टुं च तत्त्वेन प्रवेष्टुं च परंतप ॥ ५४ ॥

But by devotion to Me alone I may thus be perceived, Arjuna ! and known and seen in essence, and entered, O Parantapa ?

And again,

ये तु सर्वाणि कर्माणि मयि संन्यस्य मत्पराः ।

अनन्येनैव योगेन मां ध्यायन्त उपासते ॥ १२, ६ ॥

Those verily who, renouncing all actions in Me and intent on Me, worship, meditating on Me, with whole-hearted yoga,

तेषामहं समुद्धर्ता मृत्युसंसारसागरात् ।

भवामि न चिरात् पार्थ मम्यावेशितचेतसाम् ॥ ७ ॥

These I speedily lift up from the ocean of death and existence, O Partha their minds being fixed on Me.

Hereupon it may be argued by a reader, that if an Indian is a Hindu when he accepts these doctrines, how far can this definition be used, for the application of the non-codified law, about which doubts remain ? A man who believes in what Dr. S. Radhakrishnan and Max Mueller and Monier Williams and B.G. Tilak would recognise as components of Hinduism may well be a Hindu and any temple he and his companions build and use may be a Hindu temple within the meaning of a statute concerning temples. But what of an Indian who does not believe, in rebirth ? Mr. Nirad C. Chaudhuri, whose somewhat unpleasant book, *The Continent of Circe*, occasionally contains shrewd observations candidly expressed (and never more cogently than when the author himself exemplifies the qualities against which he rails), contends that no Hindu is ever quite devoid of religious belief. In his view even the most westernised Hindu believes in the sanctity of the cow and the great rivers, believes in the authority of the Vedas (as public ceremonies seem to show), in predestination and in the continuity of the national ethos. But what of a man who renounces all gods, ignores taboos against meat-eating, and generally behaves as if there were neither religious nor social restraints ? One must remember that a personal law is a chapter of law and is not a creed which one is at liberty to renounce as such. One cannot leave the fold of those to whom it applies unless one joins another fold recognised by law in a manner of which the law will approve and upon which it can act. Thus to believe that one has renounced Hinduism is almost as inefficacious as to believe that one has left society. The law will take no notice of it. This is not due to the flexibility of Hinduism but to the nature of the legal system of a country which applies personal laws. In order to be a Hindu for purposes of application of the personal law it is not necessary to have any particular beliefs provided one is a member of a socially recognised community, which in fact is a historical concept. In *V.T.S. Chandrasekhara Mudaliar v. Kulandaivelu Mudaliar*¹, it was held that,

although the subject matter to which the man is obliged to turn his mind is in large part religious, a valid consent for purposes of adoption can be given by a *sapinda* who has ceased to believe in the Hindu religion, at any rate to the extent of renouncing rituals and dogmas generally considered to be Hindu. One is a Hindu for this purpose though he certainly does not accept the *bhakti* path or indeed any other path.

Moreover, though it is not a lapse from Hinduism to be charitable and sociably inclined towards members of all faiths which share the *bhakti* emotion and worship a divine being, it does not follow that because an individual accepts a Hindu sage as a teacher or saint he is automatically subject to Hindu law. Conversion or re-conversion will also be necessary. The social acceptance will be required as well as the religious fellowship, and upon the former Hinduism does not insist as a matter of course.

The *Satsang* case throws light upon the situation of Hinduism today. It does not embrace those who do not choose to join the community, but it shows every favour to good and bad alike in the spirit of its greatest teacher, treating as fellows for the purposes of worship all those who approach with like intent. The so-called problem of the secular state in India would seem to melt away in the face of this demonstration. When *bhakti marga* is the predominating path the scene must be set for the attainment of the ends of that path by every citizen, and no elements from the *karma marga* may be allowed to hinder this, for if it were otherwise the State would not perform its function of protecting the good and putting down the bad.

THE SUPREME COURT JOURNAL

III]

NOVEMBER

[1966

NOTES OF RECENT CASES.

[SUPREME COURT.]

*K. Subba Rao and
V. Ramaswami, JJ.*
26th April, 1966.

*Vemareddi Ramaraghava Reddy v.
Konduru Seshu Reddy.*
C.A. No. 265 of 1964.

Madras Hindu Religious and Charitable Endowments Act (L of 1951)—Madras Act II of 1927—Specific Relief Act, section 42—Civil Procedure Codes, 1859 and 1877—Effect of compromise—Legislative History discussed.

The worshipper of a Hindu temple is entitled, in certain circumstances, to bring a suit for declaration that the alienation of the temple properties by the *de jure* Shebait is invalid and not binding upon the temple. If a Shebait has improperly alienated trust property a suit can be brought by any person interested for a declaration that such alienation is not binding upon the deity but no decree for recovery of possession can be made in such a suit unless the plaintiff in the suit has the present right to the possession. Worshipers of temples are in the position of *cestui que trustees* or beneficiaries in a spiritual sense. See *Vidyapurna Thirthaswami v. Vidyavidhi Thirthaswami (died)*, (1904) I.L.R. 27 Mad. 435 at 451 : 14 M.L.J. 105. Since the worshippers do not exercise the deity's power of suing to protect its own interests, they are not entitled to recover possession of the property improperly alienated by the Shebait, but they can be granted a declaratory decree that the alienation is not binding on the deity (see for example *Kalyana Venkataramana Aiyangar v. Kasturi Ranga Aiyangar*, (1916) 31 M.L.J. 777 : I.L.R. 40 Mad. 212 and *Chidambaranatha Thambiran v. Nallasiva Mudaliar*, (1917) 33 M.L.J. 357 : I.L.R. 41 Mad. 124. It has also been decided by the Judicial Committee in *Abdur Rahim v. Syed Abu Mohammed Barkat Ali Shah*, (1927) I.L.R. 55 I.A. 96 : 54 M.L.J. 609 : that a suit for a declaration that property belongs to a wakf can be maintained by Mahomedans interested in the wakf without the sanction of the Advocate-General, and a declaration can be given in such a suit that the plaintiff is not bound by the compromise decree relating to wakf properties.

In our opinion, section 42 of the Specific Relief Act is not exhaustive of the cases in which a declaratory decree may be made and the Courts have power to grant such a decree independently of the requirements of the section. It follows therefore in the present case that the suit of the plaintiff for a declaration that the compromise decree is not binding on the deity is maintainable as falling outside the purview of section 42 of the Specific Relief Act.

P. Babula, K. Rajendra Chaudhuri and K. R. Chaudhuri, Advocates for Appellants.

P. Ram Reddy and A. V. V. Nair, Advocates for Respondent No. 1.

T. V. R. Talachari, Advocate for Respondent No. 2.

G.R.

Decree modified.

[SUPREME COURT]

K N Wanchoo, M Hidayatullah,
S M Sikri, V Ramaswami and
J M Shelat, JJ
3rd May and 27th July, 1966

Jaichand Lal Sethia v
The State of West Bengal
Crl A No 110 of 1966

Defence of India Rules (1963)—Rule 30—Habeas Corpus Petition—Mala fide detention—Articles 14, 21, 19, 22, 358, 359 (1) of the Constitution

Even though the order as drawn up recites that the State Government was satisfied, the accuracy of that recital can be challenged in Court to a limited extent. The accuracy can be challenged in two ways either by proving that the State Government never applied its mind to the matter or that the authorities of the State Government acted *mala fide*. In a normal case the existence of such a recital in a duly authenticated order will, in the absence of any evidence as to its inaccuracy, be accepted by the Court as establishing that the necessary condition was fulfilled. In other words, in a normal case the existence of such a recital in a duly authenticated order that the State Government was satisfied will, in the absence of any evidence to the contrary, be accepted by the Court as establishing that the State Government was so satisfied. If the order of detention itself suffers from any lacuna it is open to a Court in a proper case to call for an affidavit from the Chief Minister or other Minister concerned or to call for the relevant file from the State Government, in order to satisfy itself as to the accuracy of the recital made in the order of detention.

For instance, in *Biren Dutta etc v Chief Commissioner of Tripura*, (1965) M L J (Crl) 321 (1965) 1 S C J 678 (1964) 8 S C R 295 A I R, 1965 S C 596, this Court made an order directing the Chief Secretary to the Tripura Administration to transmit to this Court the original files in respect of the detenus and also directed the Minister concerned or the Secretary or the Administrator to file an affidavit in this Court stating all the material facts indicating whether the decision arrived at was duly communicated to the detenus concerned. But the order for production of the file and for affidavit from the Minister or the Secretary concerned was made in that case because the appellant alleged that the order of review had not been reduced to writing under rule 30 A (8) and the relevant conditions prescribed by the rule had not been complied with and that it had not been communicated to him. Reference was made by Mr N G. Chatterji to another case Writ Petition No 97 of 1965 decided on 17th December, 1965 *Jagannath Mura v The State of Orissa*, A I R, 1966 S C 1140, in which this Court ordered the Home Minister to file an affidavit. In that case the order of detention was defective because the authenticated copy of the order mentioned six grounds with the disjunctive 'or' mentioned in the affidavit of the Chief Secretary. Some of these grounds were followed by 'etc'. In view of the ambiguity of the order this Court made a direction asking the State Government to produce the original order which was in the form of a document and also called for an affidavit from the Home Minister, who was in charge of matters of detention. In the present case, the material facts are different from those in *Jagannath Mura v The State of Orissa*, A I R, 1966 S C 1140, and in *Biren Dutta etc v Chief Commissioner of Tripura*, (1965) 1 S C J 678 (1965) M L J (Crl) 321 (1964) 8 S C R, 295 A I R, 1965 S C 596. It follows therefore that the High Court was justified in not making an order for discovery or production of the original departmental file containing the activities of the appellant by the Government of West Bengal.

N C Chatterjee, Senior Advocate (S K Dutta and D N Mukherjee, Advocates, with him), for Appellant

C A Daphtry, Attorney General for India and B Sen, Senior Advocate, (P A Chatterjee and P A Bose, Advocates, with them), for Respondents

G R.

Appeal dismissed

[SUPREME COURT.]

M. Hidayatullah,
V. Ramaswami and
J. M. Shelat, JJ.
28th July, 1966.

Pampapathy and
Shekarappa v. State of Mysore.
Crl.A. Nos. 121 and 122 of 1966.

Criminal Procedure Code (V of 1898), section 561-A—High Court if can cancel bail granted under section 426.

The question of law arising for determination in these appeals is whether, in the case of a person convicted of a bailable offence where bail has been granted to him under section 426 of the Criminal Procedure Code, it can be cancelled in a proper case by the High Court in exercise of its inherent power under section 561-A of the Criminal Procedure Code?

The argument put forward on behalf of the appellants is that if the Legislature intended to confer such a power on the appellate Court under section 426 it would have been very easy for it to add an appropriate sub-section and make an express provision for such a power. The omission to make such an express provision is, according to Mr. Ramamurthy, not a result of inadvertence but it is deliberate, and if that is so, it will not be permissible to take recourse to the provisions of section 561-A to clothe the appellate Court with power to cancel the bail in a case falling under section 426, Criminal Procedure Code.

If it is true that in section 496 and section 497 (5) the Legislature has made express provision for the cancellation of a bail bond in the case of accused persons released on bail during the course of the trial but no such express provision has been made by the Legislature in the case of a convicted person whose sentence has been suspended under section 426 and there has been an order of release of the appellant on bail. There is obviously a lacuna but the omission of the Legislature to make a specific provision in that behalf is clearly due to oversight or inadvertence and cannot be regarded as deliberate. If the contention of the appellants is sound it will lead to fantastic results.

Such a situation could not have been in the contemplation of the Legislature and, in our opinion, the omission to make an express provision in that behalf is manifestly due to oversight or inadvertence. In a situation of this description the High Court is not helpless and in a proper case it may take recourse to the inherent power conferred upon it under section 561-A of the Criminal Procedure Code.

The inherent power of the High Court mentioned in section 561-A, Criminal Procedure Code can be exercised only for either of the three purposes specifically mentioned in the section. The inherent power cannot be invoked in respect of any matter covered by the specific provisions of the Code. It cannot also be invoked if its exercise would be inconsistent with any of the specific provisions of the Code. It is only if the matter in question is not covered by any specific provisions of the Code that section 561-A can come into operation. No legislative enactment dealing with procedure can provide for all cases that can possibly arise and it is an established principle that the Courts should have inherent powers, apart from the express provision of law, which are necessary to their existence and for the proper discharge of the duties imposed upon them by law. This doctrine finds expression in section 561-A which does not confer any new powers on the High Court but merely recognises and preserves the inherent powers previously possessed by it. We are, therefore, of the opinion that in a proper case the High Court has inherent power under section 561-A, Criminal Procedure Code, to cancel the order of suspension of sentence and grant of bail to the appellant made under section 426, Criminal Procedure Code and to order that the appellant be re-arrested and committed to jail custody.

Considering the arguments of the appellant's counsel relying on *Lala Jairam Das v. King Emperor*, (1945) L.R. 72 I.A. 120 : (1945) 2 M.L.J. 40 the Court held the ratio of the decision of the Judicial Committee is therefore different and has no application to the present case.

In our opinion, the allegations made against the appellants would *prima facie* indicate abuse of the process of the Court and the provisions of section 561-A are attracted to the case and the High Court was entitled to cancel the bail of the appellants under the provisions of that section

M K Ramamurthi, R K Garg and S C Agarwala, Advocates of *M/s Ramamurthi & Co*, for Appellants (In both the appeals)

R Gopalakrishnan and B R G K Achar, Advocates, for Respondents (In both the appeals)

G R.

Appeal dismissed

[SUPREME COURT]

K N Wanchoo, J C Shah
and *R S Bachawat JJ*
4th August, 1966

Satrughan Isser v
Sabuypari
C A No 939 of 1963

Hindu Law—Section 3 of Act (XVIII of 1937) as amended by Act XI of 1938—Hindu women's estate—Coparcenary property

A Hindu coparcenary under the *Mistakshara* School consists of males alone it includes only those members who acquire by birth or adoption interest in the coparcenary property. The essence of coparcenary property is unity of ownership which is vested in the whole body of coparceners. While it remains joint, no individual member can predicate of the undivided property that he has a definite share therein. The interest of each coparcener is fluctuating, capable of being enlarged by deaths, and liable to be diminished by the birth of sons to coparceners. It is only on partition that the coparcener can claim that he has become entitled to a definite share. The two principal incidents of coparcenary property are that the interest of coparceners devolves by survivorship and not by inheritance and that the male issue of a coparcener acquires an interest in the coparcenary property by birth, not as representing his father but in his own independent right acquired by birth.

On the finding recorded by the trial Court which was not challenged in appeal before the High Court, *Babuji* did not separate in 1934 from the other coparceners. But he died in October, 1937 and by the operation of Act XVIII of 1937 as modified by Bihar Act VI of 1942 *Chando Kuer* was invested with her husband's interest in the coparcenary property—agricultural as well as non agricultural. When she instituted a suit for partition that interest became defined, and vested in her free from all claims or rights of the coparceners of her husband. The right of the coparceners to take that interest by survivorship on *Chando Kuer's* death was then extinguished. On her death, even though the interest was not separated by metes and bounds, and was not in her exclusive possession it still devolved upon the nearest heirs of her husband, her daughters. The suit was therefore rightly decreed by the High Court.

U P Singh for Appellant

D Goburdhan, for Respondents Nos 1 and 2

A R Chaudhuri, for Respondent No 9

G R.

Appeal dismissed

[SUPREME COURT.]

K. N. Wanchoo, J. C. Shah and
R. S. Bachawat, JJ.
5th August, 1966.

Faquir Chand v.
Sardarni Harnam Kaur.
C.A. No. 572 of 1963.

Hindu Law—Father's right to mortgage immovable property for antecedent debt incurred without legal necessity—Sons right to restrain the execution of the decree or the sale of the property in execution proceedings without showing either that there is no debt for which the father is personally liable to be paid or that the debt has been incurred for an illegal and immoral purpose.

Relying upon the proposition laid down by the Privy Council in *Brij Narain v. Mangla Prasad*, (1923) L.R. 51 I.A. 129 at 139 : 46 M.L.J. 23 which was approved by the Supreme Court in *Luhar Amritlal Nagji v. Doshi Jayantilal Jethalal*, (1960) 3 S.C.R. 842, 852-853 : A.I.R. 1960 S.C. 964, the Court held,

The decree against the father does not of its own force create a mortgage binding of the son's interest. The security of the creditor is not enlarged by the passing of the decree. In spite of the passing of the preliminary or final decree for sale or against the father, the mortgage will not, as before, bind the son's interest in the property, and the son will be entitled to ask for a declaration that his interest has not been alienated either by the mortgage or by the decree.

It follows that in the absence of a finding on the question of legal necessity, this appeal cannot be completely disposed of. The Courts below have not recorded any finding on this issue. Normally, we would have remanded the matter to the High Court for a finding on the point. But considering that the litigation is now pending for the last 14 years and the sale of the property has been improperly stayed for a long time, we have thought it fit to examine for ourselves the evidence on the record with regard to this issue.

If Murarilal was carrying on a business, it is not disputed that the business was a joint family business. The loan of Rs. 75,000 was thus taken by Murari Lal partly for payment of antecedent debts and partly for purposes of his family business and other legal necessities. The mortgage in its entirety bound the property including the interest of the sons.

B. P. Maheshwari, for Appellant.

Harbans Singh, for Respondent No. 1.

G.R.

Appeal dismissed.

[SUPREME COURT.]

K. Subba Rao, C.J., M. Hidayatullah,
S. M. Sikri, V. Ramaswami and
J. M. Shelat, JJ.
8th August, 1966.

Chandra Mohan v.
The State of Uttar Pradesh.
C.A. No. 1136 and 1638 of 1966.

U.P. Higher Judicial Service Rules—"Meaning of Judicial Officers"—Articles 233, 236, 14 and 16 of the Constitution—Powers of the Governor—Whether the Rules are ultra vires the Constitution—Powers of the High Court to appoint District Judges.

The fact that in Article 233 (2) the expression "the service" is used whereas in Articles 234 and 235 the expression "judicial service" is found is not decisive of the question whether the expression "the service" in Article 233 (2) must be something other than the judicial service, for, the entire chapter is dealing with the judicial service. The definition is exhaustive of the service. Two expressions in the definition bring out the idea that the judicial service consists of hierarchy of

judicial officers starting "from the lowest and ending with District Judges. The expressions "exclusively" and "intended" emphasise the fact that the judicial service consists only of persons intended to fill up the posts of District Judges and other civil judicial posts and that is the exclusive service of judicial officers. Having defined 'judicial service' in exclusive terms, having provided for appointments to that service and having entrusted the control of the said service to the care of the High Court the makers of the Constitution would not have conferred a blanket power on the Governor to appoint any person from any service as District Judges.

We therefore, construe the expression "the service" in clause (2) of Article 233 as the judicial service.

Till India attained independence, the position was that District Judges were appointed by the Governor from three sources, namely, (i) the Indian Civil Service, (ii) the Provincial Judicial Service, and (iii) the Bar. But after India attained independence in 1947, recruitment to the Indian Civil Service was discontinued and the Government of India decided that the members of the newly created Indian Administrative Service would not be given judicial posts. Thereafter District Judges have been recruited only from either the judicial service or from the Bar. There was no case of a member of the executive having been promoted as a District Judge that was the factual position at the time the Constitution came into force, it is unreasonable to attribute to the makers of the Constitution, who had so carefully provided for the independence of the judiciary, an intention to destroy the same by an indirect method. What can be more deleterious to the good name of the judiciary than to permit at the level of District Judges, recruitment from the executive departments? Therefore, the history of the services also supports our construction that the expression "the service" in Article 233 (2) can only mean the judicial service.

M/s Ramamurthi & Co, for Appellant (In both the appeals)

O P Rana, for Respondent No 1 (In both appeals)

B P Maheshwari, for Respondent Nos. 2 to 4 (In both appeals)

J P Goyal, for Respondent No 5 (In both appeals)

O P Verma, for Respondent No 7 (In both appeals)

Naunil Lal, for Intervener (In C.A No 1136 of 1966).

G.R.

Appeals dismissed

THE SUPREME COURT OF INDIA.

(Original Jurisdiction)

PRESENT :—A. K. SARKAR, M. HIDAYATULLAH, RAGHUBAR DAYAL, J. R. MUDHOLKAR AND R. S. BACHAWAT.

Ram Manohar Lohia

.. Petitioner*

v.

The State of Bihar and another

.. Respondents.

Constitution of India (1950), Article 359 (1)—Order dated 3rd November, 1962 made by President of India—Effect—Persons detained under the Defence of India Act, 1962 and the Rules made thereunder—If, how far and on what grounds, can challenge before Courts, the order of detention.

Defence of India Rules (1962), rule 30 (1) (b)—Scope—Order of detention by District Magistrate—Delegation of power to District Magistrate under section 40 (2) of the Defence of India Act, without imposition of any conditions—Validity—District Magistrate if can order detention to prevent possible harm outside the limits of his territorial jurisdiction—Order of detention of District Magistrate quoting a wrong notification as giving him power to detain—Effect—Order of detention under rule 30 (1) (b) to prevent acts prejudicial to "public safety" and for "maintenance of law and order"—Legality—"Law and order" if same as "public order".

As a result of the order of the President dated 3rd November, 1962, made under Article 359 of the Constitution of India, the right of any person to move any Court for enforcement the rights conferred by Articles 21 and 22 of the Constitution of India remains suspended, if such person is deprived of any such rights under the Defence of India Ordinance, 1962 (now replaced by the Defence of India Act, 1962) or any rule or order made thereunder. Two things stand forth. The first is that only the enforcement in a Court of law of rights conferred by Articles 21 and 22 is suspended and the second is that the deprivation must be under the Defence of India Ordinance (now the Defence of India Act) or any rule or order made thereunder. The word "thereunder" shows that the authority of the Defence of India Act must be made out in each case whether the deprivation is by rule or order.

But when the President suspended Article 21 of the Constitution of India, he did not make lawless actions lawful. He only took away the fundamental right in Article 21 in respect of persons proceeded against under the Defence of India Act or any rule or order made thereunder. Thus a person so proceeded against could not claim to be tried under the ordinary law or bring an action under the ordinary law. But to be able to say that the right to move the Court for the enforcement of rights under Article 21 is suspended, it is necessary to establish that such person has been deprived of any such right under the Defence of India Act or the rule or order made thereunder that is to say, under the authority of the Defence of India Act. The action of the authorities empowered by the Defence of India Act is not completely shielded from the scrutiny of Courts. The scrutiny with reference to procedure established by laws other than the Defence of India Act, is of course shut out but an enquiry whether the action is justified under the Defence of India Act itself is not shut out. The Court will not enquire whether any other law is not followed or breached but the Court will enquire whether the Defence of India Act and the Rules have been obeyed or not. That part of the enquiry and consequently the right of a person to move the Court to have that enquiry made, is not affected.

The provisions of Article 22 of the Constitution of India would have applied to arrests and detentions under the Defence of India Act also if the President's Order had not taken away from such a person the right to move any Court to enforce the protection of Article 22.

The net result of the President's Order is to stop all claims to enforce rights arising from laws other than the Defence of India Act and the Defence of India Rules and provisions of Article 22 at variance with the Defence of India Act and the Rules are of no avail. But the President's Order does not say that even if a person is proceeded against in breach of the Defence of India Act or the Rules he cannot move the Court to complain that the Defence of India Act and the Rules, under colour of which some action is taken, do not warrant it. It follows, therefore, that the Supreme Court acting under Article 32 (or the High Court acting under Article 226) on a petition for the issue of a writ of *habeas corpus* may not allow claims based on other laws or on the protection of Article 22, but it may not and indeed, must not allow breaches of the Defence of India Act or the Rules made thereunder to go unquestioned. The President's Order neither says so nor is there any such intentment.

An order of detention under the Defence of India Act or the Rules can also be challenged on the ground of want of good faith on the part of the detaining authority. Such a plea is not shut out by the Presidential Order.

The order of detention made by the District Magistrate, Patna, detaining the petitioner under rule 30 (1) (b) of the Defence of India Rules, 1962 stated "Whereas I am satisfied that with a view to preventing him (the petitioner) from acting in any manner prejudicial to the public safety and the maintenance of law and order, it is necessary to make an order that he be detained now therefore in exercise of the powers conferred under rule 30 (1) (b) of the Defence of India Rules, 1962 read with Notification No 180/CW I hereby direct that the (petitioner) be detained." The petitioner challenged this order on the following grounds (i) the notification delegating the power of detention to the District Magistrate under section 40 (2) of the Defence of India Act was invalid as it did not impose any condition for the exercise of such power, (ii) the District Magistrate in his affidavit stated that he made the order because he apprehended danger not only in his district but in the whole of the State of Bihar and even outside and hence acted outside his jurisdiction, (iii) the order of detention was defective since the District Magistrate purported to derive power to detain from Notification No 180/CW whereas he actually derived that power under Notification No 1115-C, and (iv) the District Magistrate purported to act to prevent acts prejudicial to public safety and "maintenance of law and order" whereas rule 30 (1) (b) authorises detention only to prevent acts "prejudicial to public safety and maintenance of public order."

Held, (1) section 40 (2) of the Defence of India Act does not require the imposition of any conditions but only permits it, (2) The District Magistrate could not be said to have acted outside his jurisdiction merely because he passed the order of detention because he apprehended danger from the petitioner in the whole of Bihar and even outside. There was nothing wrong if the Magistrate took a broad view of the activities of the petitioner so as to weigh the possible harm if he was not detained. Such a viewing of the activities of a person before passing the order against him does not necessarily spell out extra-territoriality but is really designed to assess properly the potentiality of dangers which is the object of rule 30 (1) (b) to prevent, (3) the mention in the order of detention, of a wrong notification by the District Magistrate under which he derived power to detain, cannot vitiate the order of detention as it is only a clerical error, and (4) By majority (Raghubar Dayal J dissenting) However, the order of detention of the petitioner was not in terms of rule 30 (1) (b) of the Defence of India Rules inasmuch as it purported to detain the petitioner to prevent him from acting in any manner prejudicial to "public safety" and "maintenance of law and orders" whereas under rule 30 (1) (b) a person can be detained only to prevent him from acting in any manner prejudicial among other things to "public safety" and the "maintenance of public order." The order of detention was therefore outside the Defence of India Act and the Rules made thereunder and the petitioner was entitled to be released from custody.

A District Magistrate is entitled to take action under rule 30 (1) (b) to prevent subversion of public order but not in aid of maintenance of law and order. One has to imagine three concentric circles. Law and order represents the largest circle within which is the next circle representing public order and the smallest circle represents security of State. Thus an act may affect law and order but not public order just as an act may affect public order but not security of State. By using the expression "maintenance of law and order" the District Magistrate was widening his own field of action and was adding a clause to the Defence of India Rules. The error is an error of a fundamental character.

The satisfaction of the Government which justifies the order under rule 30 (1) is a subjective satisfaction. A Court cannot enquire whether grounds existed which would have created that satisfaction on which alone the order could have been made in the mind of a reasonable person. If that be so when an order is on the face of it not in terms of the rule a Court cannot equally enter into an investigation whether the order of detention was in fact, irrespective of what is stated in it, in terms of the rule. In other words in such a case the State cannot be heard to say or prove that the order was in fact made for example, to prevent acts prejudicial to public order which would bring it within the rule though the order does not say so.

In the instant case the detention order mentioned two grounds one of which (prevention of acts prejudicial to public safety) was in terms of rule 30 (1) (b) while the other (maintenance of law and

order) was not. Such an order would be a bad order for it could not be said in what manner and to what extent the valid and invalid grounds operated on the mind of the detaining authority and contributed to the creation of his subjective satisfaction which formed the basis of the order.

Per *Raghubar Dayal, J.* (dissenting) : The detaining authority is free to establish that any defect in the detention order is of form only and not of substance, it being satisfied on the necessity to detain the person for a purpose mentioned in rule 30, though the purpose has been inaccurately stated in the detention order. The existence of the satisfaction required by rule 30 does not depend upon what is said in the detention order and can be established by the District Magistrate by his affidavit.

Further, the two expressions "maintenance of law and order" and "maintenance of public order" are not much different. The expression "maintenance of law and order" is generally used for "maintenance of public safety and tranquillity" which is covered by the expression "public order". It cannot be concluded that the District Magistrate's using the expression "maintenance of law and order" in place of "maintenance of public order" is any indication of the fact that he had not applied his mind to the requirements of the provisions of rule 30 or had not actually come to the conclusion that it was necessary to detain the petitioner with a view to prevent him from acting in any manner prejudicial to the maintenance of public order.

Besides, if the District Magistrate was satisfied, as he was in the instant case, that it was necessary to detain the petitioner with a view to preventing him from acting prejudicially to public safety, that itself would have justified his passing the impugned order. There is no room for considering that he might not have passed the impugned order merely with one object in view, the object being to prevent the petitioner from acting prejudicially to public safety.

Petition under Article 32 of the Constitution of India for enforcement of the Fundamental Rights.

Petitioner in Person.

A. V. Viswanatha Sastri, Senior Advocate, (*S. P. Varma*, Advocate, with him), for Respondents ;

The Court delivered the following judgments :

Sarkar, J.—Dr. Ram Manohar Lohia, a member of the Lok Sabha, has moved the Court under Article 32 of the Constitution for a writ of *habeas corpus* directing his release from detention under an order passed by the District Magistrate of Patna. The order was purported to have been made under rule 30 (1) (b) of the Defence of India Rules, 1962.

Dr. Lohia, who argued his case in person, based his claim to be released on a number of grounds. I do not propose to deal with all these grounds for I have come to the conclusion that he is entitled to be released on one of them and to the discussion of that ground alone I will confine my judgment. With regard to his other grounds I will content myself only with the observation that as at present advised, I have not been impressed by them.

The order of detention runs thus :

"Whereas I, J. N. Sahu, District Magistrate, Patna, am satisfied.....that with a view to preventing him from acting in any manner prejudicial to the public safety and the maintenance of law and order, it is necessary to make an order that he be detained : Now, therefore, in exercise of the powers conferred by clause (b) of sub-rule (1) of rule 30 of the Defence of India Rules, 1962 read with notification No. 180/GW.....I hereby direct that..... Dr. Ram Manohar Lohia be arrested.....and detained in the Central Jail, Hazaribagh, until further orders."

Now the point made by Dr. Lohia is that this order is not in terms of the rule under which it purports to have been made and, therefore, furnishes no legal justification for detention. The reason why it is said that the order is not in terms of the rule is that the rule does not justify the detention of a person to prevent him from acting in a manner prejudicial to the maintenance of law and order while the order directs detention for such purpose. It is admitted that the rule provides for an order of detention being made to prevent acts prejudicial to the maintenance of public order, but it is said that public order and law and order are not the same thing, and, therefore, though an order of detention to prevent acts prejudicial to public order

might be justifiable, a similar order to prevent acts prejudicial to law and order would not be justified by the rule. It seems to me that this contention is well founded.

Before proceeding to state my reasons for this view, I have to dispose of an argument in bar advanced by the respondent State. That argument is that the petitioner has, in view of a certain Order of the President to which I will presently refer, no right to move the Court under Article 32 for his release. It is said that we cannot, therefore, hear Dr Lohia's application at all. To appreciate this contention, certain facts have to be stated and I proceed to do so at once.

Article 352 of the Constitution gives the President of India a power to declare by Proclamation that a grave emergency exists whereby the security of India is threatened *inter alia* by external aggression. On 26th October, 1962, the President issued a Proclamation under this article that such an emergency existed. This presumably was done in view of China's attack on the north eastern frontiers of India in September, 1962. On the same day as the Proclamation was made, the President passed the Defence of India Ordinance and Rules were then made thereunder on 5th November, 1962. The Ordinance was later on 12th December, 1962 replaced by the Defence of India Act 1962 which however continued in force the Rules made under the Ordinance. On 3rd November 1962, the President made an order under Article 359 (1) which he was entitled to do, declaring

that the right of any person to move any Court for the enforcement of the rights conferred by Article 21 and Article 22 of the Constitution shall remain suspended for the period during which the Proclamation is in force if such person has been deprived of any such rights under the Defence of India Ordinance 1962 or any Rule or Order made thereunder.

There is no doubt that the reference in this order to the 'Defence of India, Ordinance, 1962' must after that Ordinance was replaced by the Act as earlier stated, be understood as a reference to the Act see *Mohan Chowdhury v The Chief Commissioner, Tripura*¹. I should now state that the Proclamation is still in force.

It is not in dispute that the present petition has been made for the enforcement of Dr Lohia's right to personal liberty under Articles 21 and 22. These articles in substance—and it should suffice for the present purpose to say no more—give people a certain personal liberty. It is said by the respondent State that the President's Order under Article 359 (1) altogether prevents us from entertaining Dr Lohia's petition and, therefore, it should be thrown out at once. This would no doubt, subject to certain exceptions to which a reference is not necessary for the purposes of the present judgment, be correct if the Order of 3rd November, 1962 took away all rights to personal liberty under Articles 21 and 22. But thus the Order does not do. It deprives a person of his right to move a Court for the enforcement of a right to such personal liberty only when he has been deprived of it by the Defence of India Act—it is not necessary to refer to the Ordinance any more as it has been replaced by the Act—or any Rule or Order made thereunder. If he has not been so deprived, the Order does not take away his right to move a Court. Thus if a person is detained under the Preventive Detention Act, 1950, his right to move the Court for enforcement of his rights under Articles 21 and 22 remains intact. That is not a case in which his right to do so can be said to have been taken away by the President's Order. This Court has in fact heard applications under Article 32 challenging a detention under that Act see *Rameshwar Shaw v District Magistrate of Burdwan*². If any person says as Dr Lohia does that he has been deprived of his personal liberty by an order not made under the Act or the Rules, there is nothing in the President's Order under Article 359 (1) to deprive him of his right to move the Court under Article 32. The Court must examine his contention and decide whether he has been detained under the Act or the Rules and can only throw out his petition when it finds that he was so detained, but not before then. If it finds that he was not so detained, it must proceed to hear his petition on its merits. The right under Article 32 is one of the fundamental rights that the Constitution has guaranteed.

¹ (1964) 3 S.C.R. 442 A.I.R. 1964 S.C.
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² A.I.R. 1964 S.C. 334

to all persons and it cannot be taken away except by the methods as provided in the Constitution, one of which is by an order made under Article 359. The contention that an order under that article has not taken away the constitutional right to personal liberty must be examined.

Mr. Verma said that *Smith v. East Elloe Rural District Council*¹ supported the contention of the respondent State. I do not think so. That case turned on an entirely different statute. That statute provided a method of challenging a certain order by which property was compulsorily purchased and stated that it could not be questioned in any other way at all. It was there held that an action to set aside the order even on the ground of having been made *mala fide*, did not lie as under the provision no action was maintainable for the purpose. That case is of no assistance in deciding the question in what circumstance a right to move the Court has been taken away by the entirely different provisions that we have to consider. Here only a right to move a Court in certain circumstances has been taken away and the question is, has the Court been moved on the present occasion in one of those circumstances? The President's Order does not bar an enquiry into that question. Apart from the fact that the reasoning on which the English case is based has no application here, we have clear observations in judgments of this Court which show that the Order of the President does not form a bar to all applications for release from detention under the Act or the Rules. I will refer only to one of them. In *Makhan Singh v. The State of Punjab*², it was said,

"If in challenging the validity of his detention order the detenu is pleading any right outside the rights specified in the Order, his right to move any Court in that behalf is not suspended."

and by way of illustration of this proposition, a case where a person was detained in violation of the mandatory provisions of the Defence of India Act was mentioned. That is the present case as the petitioner contends that the order of detention is not justified by the Act or Rules and hence is against its provisions. The petitioner is entitled to be heard and the present contention of the respondent-State must be held to be ill-founded and must fail.

I now proceed to consider the merits of Dr. Lohia's contention that the order detaining him had not been made under the Defence of India Rules. I here pause to observe that if it was not so made, there is no other justification for his detention; none is indeed advanced. He would then be entitled to him release.

I have already stated that the Proclamation of Emergency was made as the security of India was threatened by external aggression. That Proclamation of emergency was the justification for the Act. The Act in fact recited the Proclamation in its Preamble. Section 3 of the Act gave the Central Government power to make Rules providing for the detention of persons without trial for various reasons there mentioned. Rule 30 (1) (b) under which the order of detention of Dr. Lohia was made was framed under section 3 and is in these terms :

"The Central Government or the State Government if it is satisfied with respect to any particular person that with a view to preventing him from acting in any manner prejudicial to the defence of India and civil defence, the public safety, the maintenance of public order, India's relations with foreign powers, the maintenance of peaceful conditions in any part of India, the efficient conduct of military operations or the maintenance of supplies and services essential to the life of the community, it is necessary to do so may make an order—(a).....(b) directing that he be detained."

As I have said earlier, the order was made by the District Magistrate, Patna to whom the power of the Government of the State of Bihar in this regard had been duly delegated under section 40 (2) of the Act.

Under this rule a Government can make an order of detention against a person if it is satisfied that it is necessary to do so to prevent him from acting in a manner prejudicial, among other things, to public safety and the maintenance of public order. The detention order in this case is based on the ground that it was necessary

to make it to prevent Dr Lohia from acting in any manner prejudicial to public safety and the maintenance of law and order. I will, in discussing the contention of Dr Lohia, proceed on the basis as if the order directing detention was only for preventing him from acting in a manner prejudicial to the maintenance of law and order. I will consider what effect the inclusion in the order of detention of a reference to the necessity for maintaining public safety has, later. The question is whether an order could be made legally under the rule for preventing disturbance of law and order. The rule does not say so. The order, therefore, would not be in terms of the rule unless it could be said that the expression 'law and order' means the same thing as "public order" which occurs in the rule. Could that then be said? I find no reason to think so. Many of the things mentioned in the rule may in a general sense be referable to the necessity for maintaining law and order. But the rule advisedly does not use that expression.

It is common place that words in a statutory provision take their meaning from the context in which they are used. The context in the present case is the emergent situation created by external aggression. It would, therefore, be legitimate to hold that by maintenance of public order what was meant was prevention of disorder of a grave nature, a disorder which the authorities thought was necessary to prevent in view of the emergent situation. It is conceivable that the expression 'maintenance of law and order' occurring in the detention order may not have been used in the sense of prevention of disorder of a grave nature. The expression may mean prevention of disorder of comparatively lesser gravity and of local significance only. To take an illustration if people indulging in the Hindu religious festivity of Holi become rowdy, prevention of that disturbance may be called the maintenance of law and order. Such maintenance of law and order was obviously not in the contemplation of the Rules.

What the Magistrate making the order exactly had in mind by the use of the words law and order, we do not know. Indeed, we are not entitled to know that for it is well settled that Courts cannot enquire into the grounds on which the Government thought that it was satisfied that it was necessary to make an order of detention. Courts are only entitled to look at the face of the order. This was stressed on us by learned Counsel for the respondent State and the authorities fully justify that view. If, therefore, on its face an order of detention is in terms of the rule, a Court is bound to stay its hands and uphold the order. I am leaving here out of consideration a contention that an order good on the face of it is bad for reasons *de hors* it, for example because it had been made *mafa fide*. Subject to this and other similar exceptions—to which I have earlier referred and as to which it is unnecessary to say anything in the present context and also because the matter has already been examined by this Court in a number of cases—a Court cannot go behind the face of the order of detention to determine its validity.

The satisfaction of the Government which justifies the order under the rule is a subjective satisfaction. A Court cannot enquire whether grounds existed which would have created that satisfaction on which alone the order could have been made in the mind of a reasonable person. If that is so—and that indeed is what the respondent State contends—it seems to me that when an order is on the face of it not in terms of the rule, a Court cannot equally enter into an investigation whether the order of detention was in fact, that is to say, irrespective of what is stated in it, in terms of the rule. In other words, in such a case the State cannot be heard to say or prove that the order was in fact made, for example, to prevent acts prejudicial to public order which would bring it within the rule though the order does not say so. To allow that to be done would be to uphold a detention without a proper order. The rule does not envisage such a situation. The statements in the affidavit used in the present case by the respondent State are, therefore, of no avail for establishing that the order of detention is in terms of the rule. The detention was not under the affidavit but under the order. It is of some significance to point out that the affidavit sworn by the District Magistrate who made the order of detention does not say that by the use of the expression law and order he meant public order.

It was said that this was too technical a view of the matter ; there was no charm in words used. I am not persuaded by this argument. The question is of substance. If a man can be deprived of his liberty under a rule by the simple process of the making of a certain order, he can only be so deprived if the order is in terms of the rule. Strict compliance with the letter of the rule is the essence of the matter. We are dealing with a statute which drastically interferes with the personal liberty of people, we are dealing with an order behind the face of which a Court is prevented from going. I am not complaining of that. Circumstances may make it necessary. But it would be legitimate to require in such cases strict observance of the rules. If there is any doubt whether the rules have been strictly observed, that doubt must be resolved in favour of the detenu. It is certainly more than doubtful whether law and order means the same as public order. I am not impressed by the argument that the reference in the detention order to rule 30 (1) (b) shows that by law and order what was meant was public order. That is a most mischievous way of approaching the question. If that were right, a reference to the rule in the order might equally justify all other errors in it. Indeed it might with almost equal justification then be said that a reference to the rule and an order of detention would be enough. That being so, the only course open to us is to hold that the rules have not been strictly observed. If for the purpose of justifying the detention such compliance by itself is enough, a non-compliance must have a contrary effect.

*Carltona Ltd. v. Commissioners of Works*¹ is an interesting case to which reference may be made in this connection. It turned on a statutory Regulation empowering a specified authority to take possession of land for the purposes mentioned in it in various terms but which terms did not include the expression "national interest". Under this Regulation possession of certain premises of the Carltona company was taken after serving a notice on it that that was being done "in the national interest". It was contended by the Carltona company that it had been illegally deprived of the possession of its premises because the notice showed that that possession was not being taken in terms of the Regulation. This contention failed as it was held that the giving of the notice was not a pre-requisite to the exercise of the powers under the Regulation and that the notice was no more than a notification that the authorities were exercising the powers. It was said that the notice was useful only as evidence of the state of the mind of the writer and, that being so, other evidence was admissible to establish the fact that the possession of the premises was being taken for the reasons mentioned in the Regulation. Our case is entirely different. It is not a case of a notice. Under rule 30 (1) (b) a person can be detained only by an order and there is no doubt that the order of detention has to be in writing. It is not a case where the order is only evidence of the detention having been made under the rule. It is the only warrant for the detention. The order further is conclusive as to the state of the mind of the person who made it ; no evidence is admissible to prove that state of mind. It seems to me that if the Carltona case was concerned with an order which alone resulted in the dispossession, the decision in that case might well have been otherwise. I would here remind to prevent any possible misconception, that I am not considering a case where the order is challenged on the ground of *mala fides* or other similar grounds to which I have earlier referred.

Before leaving this aspect of the case, it is necessary to refer to two other things. The first is a mistake appearing in the order of detention on which some argument was based by Dr. Lohia for quashing the order. It will be remembered that the order mentioned a certain Notification No. 180/CW. The Notification intended to be mentioned however was one No. 11155/CW and the Notification No. 180/CW had been mentioned by mistake. It was under Notification No. 11155/CW that the power of the State Government to make an order of detention was delegated to the District Magistrate under the provisions of section 40 (2) of the Act to which I have earlier referred. The reference to the notification was to indicate the delegation of power. The Notification actually mentioned in the order did not, however, contain the necessary delegation. The result was that the order did not show on its

face that the District Magistrate who had made it had the necessary authority to do so. This mistake however did not vitiate the order at all. Nothing in the Rules requires that an order of detention should state that the authority making it has the power to do so. It may be that an order made by an authority to whom the Government's power has not been delegated, is a nullity and the order can be challenged on that ground. This may be one of the cases where an order good on its face may nonetheless be illegal. When the power of the person making the order is challenged, the only fact to be proved is that the power to make the order had been duly delegated to him. That can be proved by the necessary evidence, that is, by the production of the order of delegation. That would be a case somewhat like the *Carltona* case. In spite of the mistake in the order as to the Notification delegating the power, evidence can be given to show that the delegation had in fact been made. To admit such evidence would not be going behind the face of the order because what is necessary to appear on the face of the order is the satisfaction of the authority of the necessity for the detention for any of the reasons mentioned in rule 30 (1) (b) and not the authority of the maker of the order.

The second thing to which I wish to refer is that it appeared from the affidavit sworn by the District Magistrate that prior to the making of the order, he had recorded a note which ran in these words,

* Perused the report of the Senior S P Patna for detention of Dr Ram Manohar Lohia M P under rule 30 (1) (b) of the Defence of India Rules on the ground that his being at large is prejudicial to the public safety and maintenance of public order. From the report of the Sr S P Patna I am satisfied that Dr Ram Manohar Lohia M P aforesaid be detained under rule 30 (1) (b) of the Defence of India Rules. Accordingly I order that Dr Ram Manohar Lohia be detained.

I am unable to see that this note is of any assistance to the respondent State in this case. It is not the order of detention. The respondent State does not say that it is. I have earlier stated that extraneous evidence is not admissible to prove that the rule has been complied with though the order of detention does not show that. Indeed, this note does not even say that the District Magistrate was satisfied that it was necessary to make an order of detention to prevent Dr Lohia from acting in a manner prejudicial to the maintenance of public order. It only says that the Superintendent of Police reported that he was so satisfied. The satisfaction of the Superintendent of Police would provide no warrant for the detention or the order, with it we have nothing to do.

For these reasons in my view the detention order if it had been based only on the ground of prevention of acts prejudicial to the maintenance of law and order, it would not have been in terms of rule 30 (1) (b) and would not have justified the detention. As I have earlier pointed out, however, it also mentions as another ground for detention, the prevention of acts prejudicial to public safety. In so far as it does so it is clearly within the rule. Without more, we have to accept an order made on that ground as a perfectly legal order. The result then is that the detention order mentions two grounds one of which is in terms of the rule while the other is not. What then is the effect of that? Does it cure the illegality in the order that I have earlier noticed? This question is clearly settled by authorities. In *Shibban Lal Saksena v The State of Uttar Pradesh*¹, it was held that such an order would be a bad order, the reason being that it could not be said in what manner and to what extent the valid and invalid grounds operated on the mind of the authority concerned and contributed to the creation of his subjective satisfaction which formed the basis of the order. The order has, therefore, to be held illegal though it mentioned a ground on which a legal order of detention could have been based. I should also point out that the District Magistrate has not said in his affidavit that he would have been satisfied of the necessity of the detention order only for the reason that it was necessary to detain Dr Lohia to prevent him from acting in a manner prejudicial to public safety.

In the result, in my view, the detention order is not under the Rules. The detention of Dr Lohia under that order is not legal and cannot be justified. He is entitled to be set at liberty and I would order accordingly.

Hidayatullah, J.—(on behalf of himself and *Bachawat, J.*) Dr. Ram Manohar Lohia, M. P., has filed this petition under Article 32 of the Constitution asking for a writ of *habeas corpus* for release from detention ordered by the District Magistrate, Patna under rule 30 (1) (b) of the Defence of India Rules, 1962. He was arrested at Patna on the night between 9th and 10th August, 1965. As it will be necessary to refer to the terms of the order served on him it is reproduced here :

“ORDER

No. 3912—C.

Patna, Dated 9th August, 1965.

Whereas I, J.N. Sahu, District Magistrate, Patna, am satisfied with respect to the person known as Dr. Ram Manohar Lohia, Circuit House, Patna, that with a view to preventing him from acting in any manner prejudicial to the public safety and the maintenance of law and order, it is necessary to make an order that he be detained.

Now, therefore, in exercise of the powers conferred by clause (b) of sub-clause (1) of rule 30 of the Defence of India Rules, 1962 read with Notification No. 180/G.W. dated the 20th March, 1964, of the Government of Bihar, Political (Special) Department, I hereby direct that the said Dr. Ram Manohar Lohia be arrested by the Police wherever found and detained in the Central Jail, Hazaribagh, until further orders.

(Sd.) J. N. Sahu,

9th August, 1965.

District Magistrate, Patna.

(Sd.) Ram Manohar Lohia.

10th August—1.40.”

Dr. Lohia was lodged in the Hazaribagh Central Jail at 3-30 P.M. on 10th August, 1965. He sent a letter in Hindi together with an affidavit sworn in the jail to the Chief Justice, which was received on 13th August, 1965, in the Registry of this Court. Although the petition was somewhat irregular, this Court issued a rule and as no objection has been taken on the ground of form we say nothing more about it.

In his affidavit Dr. Lohia stated that he was arrested at midnight on 9th August, 1965, and was told that it was on charges of arson but later was served with the order of detention and that in this way his arrest for a substantive offence was turned into preventive detention. He further stated that the order of detention showed that he was to be detained in Bankipur Jail but the name of the Jail was scored out and “Central Jail, Hazaribagh” was substituted which led him to conclude that typed orders of detention were kept ready and that the District Magistrate did not exercise his mind in each individual case. He contended that his detention under rule 30 (1) (b) was illegal because, according to him, that rule dealt with prejudicial activities in relation to the defence of India and civil defence and not with maintenance of law and order of a purely local character. He alleged that the arrest was *mala fide* and malicious; that it was made to prevent him from participating in the House of the People which was to go into Session from 16th August, and particularly to keep him away from the debate on the Kutch issue. He further alleged that he had only addressed a very large gathering in Patna and had disclosed certain things about the Bihar Government which incensed that Government and caused them to retaliate in this manner and that detention was made to prevent further disclosures by him.

In answer to Dr. Lohia's affidavit two affidavits were filed on behalf of the respondents. One affidavit, filed by the District Magistrate, Patna, denied that there was any malice or *mala fides* in the arrest of Dr. Lohia. The District Magistrate stated that he had received a report from the Senior Superintendent of Police, Patna, in regard to the conduct and activities of Dr. Lohia and after considering the report he had ordered Dr. Lohia's detention to prevent him from acting in any manner prejudicial to the public safety and maintenance of public order. He stated further that he was fully satisfied that the forces of disorder

“which were sought to be let loose if not properly controlled would envelope the whole of the State of Bihar and possibly might spread in other parts of the country which would necessarily affect the problem of external defence as well in more ways than one.”

He said that the report of the Senior Superintendent of Police, Patna contained facts which he considered sufficient for taking the said action but he could not disclose

the contents of that report in the public interest. He sought to correct what he called, a slip in the order passed by him by stating that notification No 11155 C dated 11th August, 1964, was meant instead of the notification mentioned there. He stated further that as the disturbance was on a very large scale it was thought expedient to keep ready typed copies of detention orders and to make necessary alterations in them to suit individual cases at the time of the actual issuance of the orders, and that it was because of this that the words "Central Jail, Hazaribagh" were substituted for "Bankipur Jail". He denied that he had not considered the necessity of detention in each individual case. He repudiated the charge that the arrest was made at the instance of Government and affirmed that the action was taken on his own responsibility and in the discharge of his duty as District Magistrate and not in consultation with the Central or the State Governments. He denied that the arrest and detention were the result of anger on the part of any or a desire to prevent Dr Lohia from circulating any damaging information about Government. The District Magistrate produced an order which, he said, was recorded before the order of detention. As we shall refer to that order later it is reproduced here.

"9th August 1965

* Perused the report of the Senior S P Patna for detention of Dr Rama Manohar Lohia M P under rule 30 (1) (b) of the Defence of India Rules on the ground that his being at large is prejudicial to the public safety and maintenance of public order. From the report of the Sr S P Patna I am satisfied that Dr Ram Manohar Lohia M P aforesaid be detained under rule 30 (1) (b) of the Defence of India Rules. Accordingly I order that Dr Ram Manohar Lohia be detained under rule 30 (1) (b) of the Defence of India Rules read with Notification No 80/CW, dated 20th March 1964 in the Hazaribagh Central Jail until further orders.

Send four copies of the warrant of arrest to the Sr S P Patna for immediate compliance. He should return two copies of it after service on the detainee.

(Sd) J N Sahu

District Magistrate, Patna "

The second affidavit was sworn by Rajpati Singh, Police Inspector, attached to the Kotwali Police Station, Patna. He stated in his affidavit that the order was served on Dr Lohia at 1.40 A.M. on 10th August, 1965, and not at midnight. He denied that Dr Lohia was arrested earlier or that at the time of his arrest he was informed that the arrest was for an offence or offences of arson. He admitted, however, that he had told him that cases of arson and loot had taken place. He affirmed that there was no charge of arson against Dr Lohia.

Dr Lohia filed a rejoinder affidavit and in that affidavit he stated that the internal evidence furnished by the order taken with the counter affidavits disclosed that his arrest and detention were patently illegal. He pointed out that while rule 30 (1) (b) provided that detention could be made for the maintenance of public order, the order stated that Dr Lohia was arrested for maintenance of law and order. He characterised the counter affidavits as full of lies and narrated other facts intending to show that there was a conspiracy to seal his mouth so that disclosures against the Bihar Government might not be made. Thus represents the material on which the present petition is based or opposed.

The petition was argued by Dr Lohia in person though he was receiving assistance in constructing his arguments. His contentions are that he is not being detained under the Defence of India Rules but arbitrarily, that even if he is being detained under the said Rules the law has been flagrantly violated, that the order passed against him is *mala fide* and that the District Magistrate did not exercise the delegated power but went outside it in various ways rendering the detention illegal.

On behalf of the State a preliminary objection is raised that the application itself is incompetent and that by the operation of Article 359 read with the President's Order issued under that Article on 3rd November, 1962, Dr Lohia's right to move the Supreme Court under Article 32 of the Constitution is taken away.

during the period of emergency proclaimed under Article 352 as long as the President's Order continues. On merits it is contended on behalf of the State of Bihar that the petition, if not barred, does not make out a case against the legality of the detention ; that this Court cannot consider the question of good faith and that the only enquiry open to this Court is whether there is or is not an order under rule 30 (1) (b) of the Defence of India Rules, 1962. If this Court finds that there is such an order the enquiry is closed because the petition must then be considered as incompetent. The State Government admits that the words of rule 30 (1) (b) and section 3 of the Defence of India Act were not used in the order of detention but contends that maintenance of public order and maintenance of law and order do not indicate different things and that the area covered by maintenance of law and order is the same if not smaller than the area covered by the expression maintenance of public order. We shall go into last contention more elaborately after dealing with the preliminary objection.

Questions about the right of persons detained under the Defence of India Rules to move the Court have come up frequently before this Court and many of the arguments which are raised here have already been considered in a series of cases. For example, it has been ruled in *Mohan Choudhury v. Chief Commissioner, Tripura*¹ that the right of any person detained under the Defence of India rules to move any Court for the enforcement of his rights conferred by Articles 21 and 22 of the Constitution remains suspended in view of the President's Order of 3rd November, 1962. It has also been ruled that such a person cannot raise the question that the Defence of India Act or the Rules are not valid because, if allowed to do so, that would mean that the petitioner's right to move the Court is intact. Other questions arising from detentions under the Defence of India Rules were further considered in *Makhan Singh v. The State of Punjab*². It is there pointed out that, although the right of the detenu to move the Court is taken away that can only be in cases in which the proper detaining authority passes a valid order of detention and the order is made *bona fide* for the purpose which it professes. It would, therefore, appear from the latter case that there is an area of enquiry open, before a Court will declare that the detenu has lost his right to move the Court. That area at least embraces an enquiry into whether there is action by a competent authority and in accordance with Defence of India Act and the Rules thereunder. Such an enquiry may not entitle the Court to go into the merits of the case once it is established that proper action has been taken, for the satisfaction is subjective, but till that appears the Court is bound to enquire into the legality of the detention. It was contended that *Makhan Singh's case*², arose under Article 226 and that what is stated there applies only to petitions under that article. This is a misapprehension. The ruling made no difference between Article 32 and Article 226 in the matter of the bar created by Article 359 and the President's Order. What is stated there applies to petitions for the enforcement of Fundamental Rights whether by way of Article 32 or Article 226.

Mr. Verma appearing for the State of Bihar, however, contends that the area of the enquiry cannot embrace anything more than finding out whether there is an order of detention or not and the moment such an order, good on its face, is produced all enquiry into good faith, sufficiency of the reasons or the legality or illegality of the action comes to an end, for to go into such matters is tantamount to allowing the petitioner to move the Court which the President's Order does not permit. He contends that the Courts' power to issue a writ of *habeas corpus* in such cases is taken away as completely as if clause (2) of Article 32 made no mention of the writ of *habeas corpus*. According to him, an order under rule 30 (1) (b) proper on its face, must put an end to enquiry of any kind. In view of this objection it is necessary to state the exact result of the President's Order for this has not been laid down in any earlier decision of this Court.

The President declared a state of grave emergency by issuing a Proclamation under Article 352 on 26th October, 1962. This Proclamation of Emergency gave

1. (1961) 3 S.C.R. 442 : A.I.R. 1961 S.C. 173.

2. A.I.R. 1964 S.C. 381.

rise to certain extraordinary powers which are to be found in Part XVIII of the Constitution, entitled Emergency Provisions. Article 358 suspended the provisions of Article 19 during the Emergency and Article 359 permitted the suspension of the enforcement of the rights conferred by Part III. That article reads

"359 *Suspension of the enforcement of the rights conferred by Part III during emergencies*—(1) Where a Proclamation of Emergency is in operation the President may by order declare that the right to move any Court for the enforcement of such of the rights conferred by Part III as may be mentioned in the order and all proceedings pending in any Court for the enforcement of the rights so mentioned shall remain suspended for the period during which the Proclamation is in force or for such shorter period as may be specified in the order

(2) An order made as aforesaid may extend to the whole or any part of the territory of India

(3) Every order made under clause (1) shall as soon as may be after it is made be laid before each House of Parliament

The President issued an Order on 3rd November, 1962. The Order reads

* ORDER

New Delhi the 3rd November, 1965

G.S.R. 1464.—In exercise of the powers conferred by clause (1) of Article 359 of the Constitution the President hereby declares that the right of any person to move any Court for the enforcement of the rights conferred by Article 21 and Article 22 of the Constitution shall remain suspended for the period during which the Proclamation of Emergency issued under clause (1) of Article 352 thereof on the 26th October 1962 is in force if such person has been deprived of any such rights under the Defence of India Ordinance 1962 (IV of 1962) or any rule or order made thereunder

No F 4/62 Poll (Spl)

V VISWANATHAN Secretary "

As a result of the above Order the right of any person to move any Court for the rights conferred by Articles 21 and 22 of the Constitution remains suspended, if such person is deprived of any such rights under the Defence of India Ordinance, 1962 (now the Defence of India Act, 1962) or any rule or order made thereunder. No doubt, as the article under which the President's Order was passed and also that Order say, the right to move the Court is taken away but that is in respect of a right conferred on any person by Articles 21 and 22 and provided such person is deprived of the right under the Defence of India Ordinance (now the Act) or any rule or order made thereunder. Two things stand forth. The first is that only the enforcement in a Court of law of rights conferred by Articles 21 and 22 is suspended and the second is that the deprivation must be under the Defence of India Ordinance (now the Act) or any rule or order made thereunder. The word "thereunder" shows that the authority of the Defence of India Act must be made out in each case whether the deprivation is by rule or order.

It, therefore, becomes necessary to inquire what are the rights which are so affected? This can only be found out by looking into the content of the Articles 21 and 22. Article 21 lays down the no person is to be deprived of his life or personal liberty except according to procedure established by law. This article thinks in terms of the ordinary laws which govern our society when there is no declaration of emergency and which are enacted subject to the provisions of the Constitution including the Chapter on Fundamental Rights but other than those made under the powers conferred by the Emergency Provisions in Part XVIII. When the President suspended the operation of Article 21 he took away from any person dealt with under the terms of his Order, the right to plead in a Court of law that he was deprived of his life and personal liberty otherwise than according to the procedure established by the laws of the country. In other words, he could not invoke the procedure established by ordinary law. But the President did not make lawless actions lawful. He only took away the fundamental right in Article 21 in respect of a person proceeded against under the Defence of India Act or any rule or order made thereunder. Thus a person so proceeded could not claim to be tried under the ordinary law or bring an action under the ordinary law. But to be able to say that the right to move the Court for the enforcement of rights under Article 21 is suspended, it is necessary to establish that such person has been deprived of any such right under the Defence of India Act or any rule or order made thereunder, that is to say, under the authority of the Act. The action of the authorities empowered by the Defence

of India Act is not completely shielded from the scrutiny of Courts. The scrutiny with reference to procedure established by laws other than the Defence of India Act is, of course, shut out but an enquiry whether the action is justified under the Defence of India Act itself is not shut out. Thus the State Government or the District Magistrate cannot add a clause of their own to the Defence of India Act or even the Rules and take action under that clause. Just as action is limited in its extent, by the power conferred, so also the power to move the Court is curtailed only when there is strict compliance with the Defence of India Act and the Rules. The Court will not enquire whether any other law is not followed or breached but the Court will enquire whether the Defence of India Act or the Rules have been obeyed or not. That part of the enquiry and consequently the right of a person to move the Court to have that enquiry made, is not affected.

The President's Order next refers to Article 22. That Article creates protection against illegal arrest and detention. Clause (1) confers some rights on the person arrested. Clause (2) lays down the procedure which must be followed after an arrest is made. By clause (3) the first two clauses do not apply to an alien enemy or to a person arrested or detained under any law providing for preventive detention. Clauses (4), (5), (6) and (7) provide for the procedure for dealing with persons arrested or detained under any law providing for preventive detention, and lay down the minimum or compulsory requirements. The provisions of Article 22 would have applied to arrest and detentions under the Defence of India Act also if the President's Order had not taken away from such a person the right to move any Court to enforce the protection of Article 22.

The net result of the President's Order is to stop all claims to enforce rights arising from laws other than the Defence of India Act and the Rules and the provisions of Article 22 at variance with the Defence of India Act and the Rules are of no avail. But the President's Order does not say that even if a person is proceeded against in breach of the Defence of India Act or the Rules he cannot move the Court to complain that the Act and the Rules, under colour of which some action is taken, do not warrant it. It was thus that this Court questioned detention orders by Additional District Magistrates who were not authorised to make them or detentions of persons who were already in detention after conviction or otherwise for such a long period that detention orders served could have had no relation to the requirements of the Defence of India Act or the Rules. Some of these cases arose under Article 226 of the Constitution but in considering the bar of Article 359 read with the President's Order, there is no difference between a petition under that article and a petition under Article 32. It follows, therefore, that this Court acting under Article 32 on a petition for the issue of a writ of *habeas corpus*, may not allow claims based on other laws or on the protection of Article 22, but it may not and, indeed must not, allow breaches of the Defence of India Act or the Rules to go unquestioned. The President's Order neither says so nor is there any such intendment.

There is, however, another aspect which needs to be mentioned here. That is the question of want of good faith on the part of those who take action and whether such a plea can be raised. This topic was dealt with in *Makhan Singh's case*¹ At page 400 the following observations is to be found :—

"Take also a case where the detenu moves the Court for a writ of *habeas corpus* on the ground that his detention has been ordered *mala fide*. It is hardly necessary to emphasise that the exercise of a power *mala fide* is wholly outside the scope of the Act conferring the power and can always be successfully challenged. It is true that a mere allegation that the detention is *mala fide* would not be enough ; the detenu will have to prove the *mala fides*. But if the *mala fides* are alleged, the detenu cannot be precluded from substantiating his plea on the ground of the bar created by Article 359 (1) and the Presidential Order. That is another kind of plea which is outside the purview of Article 359 (1)."

Mr. Verma, however, contends on the authority of *Smith v. East Elloe Rural District Council and others*² that the validity of the orders under the Defence of India Rules, 1962 cannot be challenged on the ground of bad faith when the action is otherwise proper. That case dealt with the Acquisition of Land (Authorization

1. A.I.R. 1964 S.C. 381, 399.

2. L.R. (1956) A.C. 736.

Procedure) Act, 1946 (9 and 10 Geo 6 c 49) Paragraph 15 (1) of Part IV of Schedule to that Act provided

' If any person aggrieved by a compulsory purchase order dares to question the validity thereof on the ground that the authorization of a compulsory purchase thereby granted is not empowered to be granted under this Act he may, within six weeks from the date on which notice of the confirmation or making of the order is first published make an application to the High Court

The appellant more than six weeks after the notice had been published brought an action, claiming *inter alia* that the order was made and confirmed wrongfully and in bad faith on the part of the clerk Paragraph 16 of that Act provided

' Subject to the provisions of the last foregoing paragraph a compulsory purchase order shall not be questioned in any legal proceeding whatsoever

The House of Lords (by majority) held that the jurisdiction of the Court was ousted in such wise that even questions of bad faith could not be raised Viscount Simonds regretted that it should be so but giving effect to the language of paragraph 16, held that even an allegation of bad faith was within the bar of Paragraph 16 Lord Morton of Henryton, Lord Reid and Lord Somervill of Harrow were of opinion that Paragraph 15 gave no such opportunity Lord Radcliffe dissented

The cited case can have no relevance here because the statute provided for ouster of Court's jurisdiction in very different circumstances Although this Court has already stated that allegations of bad faith can be considered, it may be added that where statutory powers are conferred to take drastic action against the life and liberty of a citizen, those who exercise it may not depart from the purpose. Vast powers in the public interest are granted but under strict conditions If a person, under colour of exercising the statutory power, acts from some improper or ulterior motive, he acts in bad faith The action of the authority is capable of being viewed in two ways Where power is misused but there is good faith the act is only *ultra vires* but where the misuse of power is in bad faith or there is added to the *ultra vires* character of act, another vitiating circumstance, Courts have always acted to restrain a misuse of statutory power and the more readily when improper motives underlie it The misuse may arise from a breach of the law conferring the power or from an abuse of the power in bad faith In either case the Courts can be moved for we do not think that Article 359 or the President's Order were intended to condone an illegitimate enforcement of the Defence of India Act

We now proceed to examine the contentions of Dr Lohia by which he claims to be entitled to have the order of the District Magistrate set aside It is convenient to begin with the allegation of want of good faith Dr Lohia alleges that there was a conspiracy between the Central Government, the State of Bihar, the Senior Superintendent of Police and the District Magistrate, Patna to stifle his disclosures against the Bihar Government, the Chief Minister and others He also alleges that he was arrested for a substantive offence under the Indian Penal Code but the arrest has been converted into preventive detention to avoid proof in a Court of law He says that he was about to leave Patna and if the train was not late he would have gone away and he hints that his detention was made to prevent him from taking part in the Session of Parliament The District Magistrate and the Inspector of Police deny these allegations The District Magistrate has given the background of events in which he made the order on his responsibility On reading the affidavits on both sides, we are satisfied that the contentions of Dr Lohia are ill founded and that the order of detention was made by the District Magistrate in good faith

There is no dispute that the District Magistrate was duly authorized to act under rule 30 of the Defence of India Rules 1962 Dr Lohia, however, says that the order is in flagrant disregard of the requirements of the Defence of India Act 1962 and the Rules For this purpose he bases his argument on three circumstances

(1) that the District Magistrate acted outside his jurisdiction as created by Notification No 11155 C dated 11th August, 1964, published in the Bihar Gazette Extraordinary, dated 11th August, 1964,

(ii) that the District Magistrate's order is defective because he purports to derive power from Notification No. 180 of 20th March, 1964, which had been rescinded ; and

(iii) that the District Magistrate purports to act to maintain law and order when he can only act to maintain public order under the Defence of India Act and the Rules thereunder.

We shall now consider these grounds of objection. Before we do so we may read the provisions of the Defence of India Act and the Rules to which reference may be necessary ;

The first part of the Defence of India Act we wish to read is the long title and the preamble. They are ;

" An Act to provide for special measures to ensure the public safety and interest, the defence of India and civil defence and for the trial of certain offences and for matters connected therewith.

WHEREAS the President has declared by Proclamation under clause (1) of Article 352 of the Constitution that a grave emergency exists whereby the security of India is threatened by external aggression :

AND WHEREAS it is necessary to provide for special measures to ensure the public safety and interest, the defence of India and civil defence and for the trial of certain offences and for matters connected therewith ;

* * * * *

We may next read section 3 which confers power to make Rules :

" 3. *Power to make Rules.*—(1) The Central Government may, by notification in the Official Gazette, make such Rules as appear to it necessary or expedient for securing the defence of India and civil defence, the public safety, the maintenance of public order or the efficient conduct of military operations, or for maintaining supplies and services essential to the life of the community."

Then by way of illustration and without prejudice to the generality of the powers conferred by sub-section (1), certain specific things are mentioned for which provision may be made by rule. Clause 15 provides :

" (15) Notwithstanding anything in any other law for the time being in force:

(i) the apprehension and detention in custody of any person whom the authority empowered by the rules to apprehend or detain (the authority empowered to detain not being lower in rank than that of a District Magistrate) suspects, on grounds appearing to that authority to be reasonable, of being of hostile origin or of having acted, acting being about to act or being likely to act in a manner prejudicial to the defence of India and civil defence, the security of the State, the public safety or interest, the maintenance of public order, India's relations with foreign States, the maintenance of peaceful conditions in any part or area of India or the efficient conduct of military operations, or with respect to whom that authority is satisfied that his apprehension and detention are necessary for the purpose of preventing him from acting in any such prejudicial manner,

(ii) the prohibition of such person from entering or residing or remaining in any area,

(iii) the compelling of such person to reside and remain in any area, or to do or abstain from doing anything, and

(iv) the review of orders of detention passed in pursuance of any rule made under sub-clause (i), "

We need not trouble ourselves with the other clauses. Section 44 next provides :

" 44. *Ordinary avocations of life to be interfered with as little as possible.*—Any authority or person acting in pursuance of this Act shall interfere with the ordinary avocations of life and the enjoyment of property as little as may be consonant with the purpose of ensuring the public safety and interest and the defence of India and civil defence."

By virtue of the powers conferred by section 3 of the Defence of India Ordinance, 1962 (now the Act), the Defence of India Rules, 1962 were framed. Part IV of these Rules is headed " Restriction of Movements and Activities of Persons " and it consists of rules 25—30, 30-A, 30-B and 31—34. These rules provide for various subjects such as " *Entering enemy territory* " (Rule 25), " *Entering India* " (Rule 26), " *Information to be supplied by persons entering India* " (Rule 27) or " *Leaving India* " (Rule 28), " *Regulation of Movement of Persons within India* " (Rule 29), " *Powers of photographing etc. of suspected person* " (Rule 31), " *Control and winding up of certain organisations* " (rule 32), provisions for " *Persons captured as prisoners* " (rule 33) and " *Change of name by citizens of India* " (rule 34).

We are really not concerned with these rules but the headings are mentioned to consider the argument of Dr Lohia on No (a) above Rule 30 with which we are primarily concerned consists of eight sub rules. We are concerned only with sub rule (1). That rule reads

"30 Restriction of movements of suspected persons restriction orders and detention orders —

(1) The Central Government or the State Government if it is satisfied with respect to any particular person that with a view to preventing him from acting in any manner prejudicial to the defence of India and civil defence, the public safety, the maintenance of public order, India's relations with foreign powers, the maintenance of peaceful conditions in any part of India, the efficient conduct of military operations or the maintenance of supplies and services essential to the life of the community, it is necessary so to do, may make an order—

- (a) * * * * *
- (b) directing that he be detained, * * * * *

Under section 40 (2) of the Defence of India Act, the State Government may by order direct that the powers conferred by the Rules may be exercised by any officer or authority in such circumstances and under such conditions as may be specified in the direction. A special limitation was indicated in section 3 (15) of the Act, where authority is given for making rules in connection with the apprehension and detention in custody of persons that the delegation should not be made to an officer below the rank of a District Magistrate.

By virtue of these various powers the State Government issued a notification on 20th March, 1964 authorising all District Magistrates to exercise the powers of Government under rule 30 (1) (b). That notification was later rescinded by another notification issued on 5th June, 1964. A fresh notification (No 11155 C) was issued on 11th August, 1964. This was necessary because of a mistake in the first notification. The new notification reads

* No 11155-C.—In exercise of the powers conferred by sub-section (2) of section (40) of the Defence of India Act, 1962 (LI of 1962) the Governor of Bihar is pleased to direct that the powers exercisable by the State Government under clause (b) of sub-rule (1) of rule 30 of the Defence of India Rules 1962, shall be exercised by all District Magistrates within their respective jurisdictions.

By order of the Governor of Bihar
M K Mukharji,
Secretary to Government."

Dr Lohia contends that the District Magistrate in his affidavit says that he apprehended danger not only in his district but in the whole of Bihar State and even outside and hence he has not acted within his jurisdiction. His argument attempts to make out, what we may call, an exercise of extraterritorial jurisdiction on the part of the District Magistrate. He contends also that the notifications are bad because although the Defence of India Act contemplates the imposition of conditions, none were imposed and no circumstances for the exercise of power were specified. In our judgment, none of these arguments can be accepted.

Section 40 (2) of the Act does not require the imposition of any conditions but only permits it. This is apparent from the words "if any" in the sub-section. The only condition that the State Government thought necessary to impose is that the District Magistrates must act within their respective jurisdictions. It cannot be said that this condition was not complied with. Dr Lohia was in the Patna District at the time. There was nothing wrong if the District Magistrate took a broad view of his activities so as to weigh the possible harm if he was not detained. Such a viewing of the activities of a person before passing the order against him does not necessarily spell out extra territoriality in the sense suggested but is really designed to assess properly the potentiality of danger which is the main object of the rule to prevent. We find nothing wrong with the order on the score of jurisdiction and argument No (i) stated above must fail. Argument No (ii) is not of any substance. There was a clerical error in mentioning the notification and the error did not vitiate the order of detention.

This brings us to the last contention of Dr. Lohia and that is the most serious of all. He points out that the District Magistrate purports to detain him with a view to preventing him from acting in any manner prejudicial to the public safety and the maintenance of law and order and argues that the District Magistrate had misunderstood his own powers which were to prevent acts prejudicial to public order and, therefore, the detention is illegal. On the other side, Mr. Verma contends that the Act and the Rules speak of public order which is a concept much wider in content than the concept of law and order and includes the latter, and whatever is done in furtherance of law and order must necessarily be in furtherance of public order. Much debate took place on the meaning of the two expressions. Alternatively, the State of Bihar contends that the order passed by the District Magistrate prior to the issue of the actual order of detention made use of the phrase "maintenance of public order" and the affidavit which the District Magistrate swore in support of the return also uses that phrase and, therefore, the District Magistrate was aware of what his powers were and did exercise them correctly and in accordance with the Defence of India Act and the Rules. We shall now consider the rival contentions.

The Defence of India Act and the Rules speak of the conditions under which preventive detention under the Act can be ordered. In its long title and the preamble the Defence of India Act speaks of the necessity to provide for special measures to ensure public safety and interest, the defence of India and civil defence. The expression public safety and interest between them indicate the range of action for maintaining security, peace and tranquillity of India whereas the expressions defence of India and civil defence cannot be defence of India and its people against aggression from outside and action of persons within the country. These generic terms were used because the Act seeks to provide for a congeries of action of which preventive detention is just a small part. In conferring power to make rules, section 3 of the Defence of India Act enlarges upon the terms of the preamble by specification of details. It speaks of defence of India and civil defence and public safety without change but it expands the idea of public interest into maintenance of public order, the efficient conduct of military operations and maintaining of supplies and services essential to the life of the community. Then it mentions by way of illustration in clause (15) of the same section the power of apprehension and detention in custody of any person whom the authority empowered by the rules to apprehend or detain (the authority empowered to detain not being lower in rank than that of a District Magistrate), suspects, on grounds appearing to that authority to be reasonable—

(a) of being of hostile origin ; or

(b) of having acted, acting or being about to act or being likely to act in manner prejudicial to—

(i) the defence of India and civil defence ;

(ii) the security of the State ;

(iii) the public safety or interest ;

(iv) the maintenance of public order ;

(v) India's relations with foreign states ;

(vi) the maintenance of peaceful conditions in any part or area of India ; or

(vii) the efficient conduct of military operations.

It will thus appear that security of the state, public safety or interest, maintenance of public order and the maintenance of peaceful conditions in any part or area of India may be viewed separately even though strictly one clause may have an effect or bearing on another. Then follows rule 30, which repeats the above conditions and permits detention of any person with a view to preventing him from acting in any of the above ways. The argument of Dr. Lohia that the conditions are to be cumulatively applied is clearly untenable. It is not necessary to analyse rule 30

which we quoted earlier and which follows the scheme of section 3 (15). The question is whether by taking power to prevent Dr Lohia from acting to the prejudice of "law and order" as against "public order" the District Magistrate went outside his powers.

The subject of preventive detention has been discussed almost threadbare and one can hardly venture in any direction without coming face to face with rulings of Courts. These cases are now a legion. It may be taken as settled that the satisfaction of the detaining authority cannot be subjected to objective tests, that the Courts are not to exercise appellate powers over such authorities and that an order proper on its face, passed by a competent authority in good faith is a complete answer to a petition such as this. The rulings in our country adopt this approach as do the English Courts. In England one reason given for the adoption of this approach was that the power was entrusted to the Home Secretary and to the Home Secretary alone. In India, Courts are ordinarily satisfied on the production of a proper order of detention made in good faith by an authority duly authorised and have not enquired further even though the power is exercised by thousands of officers subordinate to the Central and State Governments as their delegates. When from the order itself circumstances appear which raise a doubt whether the officer concerned had not misconceived his own powers, there is need to pause and enquire. This is more so when the exercise of power is at the lowest level permissible under the Defence of India Act. The enquiry then is not with a view to investigate the sufficiency of the materials but into the officer's notions of his power, for it cannot be conceived for a moment that even if the Court did not concern itself about the sufficiency or otherwise of the materials on which action is taken, it would, on proof from the order itself that the officer did not realise the extent of his own powers, not question the action. The order of detention is the authority for detention. That is all which the detenu or the Court can see. It discloses how the District Magistrate viewed the activity of the detenu and what the District Magistrate intended to prevent happening. If the order passed by him shows that he thought that his powers were more extensive than they actually were, the order might fail to be a good order.

The District Magistrate here acted to maintain law and order and not public order. There are only two possibilities: (i) that there was a slip in preparing the order, or (ii) that maintenance of law and order was in the mind of the District Magistrate and he thought it meant the same thing as maintenance of public order. As to the first it may be stated at once that the District Magistrate did not specify it as such in his affidavit. He filed an earlier order by him in which he had used the words "public order" and which we have quoted earlier. That order did not refer to his own state of the mind but to the report of the Senior Superintendent of Police. In his affidavit he mentioned "public order" again but did not say that the words "law and order" in his order detaining Dr Lohia were a slip. He corrected the error about the notification but naively let pass the other and more material error, without any remark. Before us every effort possible was made to reconcile "public order" with "law and order" as, indeed, by a process of paraphrasing, it is possible to raise even between phrases as dissimilar as "for preventing breach of the peace", "in the interest of the public", "for protecting the interests of a class of persons", "for administrative reasons" and "for maintaining law and order". We cannot go by similitude. If public order connotes something different from law and order even though there may be some common territory between them then obviously the District Magistrate might have traversed ground not within "public order". It would then not do to say that the action is referable to one power rather than the other, just as easily as one reconciles diverse phrases by a gloss. When the liberty of the citizen is put within the reach of authority and the scrutiny from Courts is barred, the action must comply not only with the substantive requirements of the law but also with those forms which alone can indicate that the substance has been complied with. It is, therefore, necessary to examine critically the order which mentioned "law and order" with a view to ascertaining whether the District Magistrate did not act outside his powers.

Before we do so we find it necessary to deal with an argument of Mr. Shas who followed Mr. Verma. He contends that there is no magic in using the formula of the Act and Rules for the language of the Act and the Rules can be quoted mechanically. We regret such an attitude. The President in his Order takes away the fundamental rights under Articles 21 and 22 from a person provided he has been detained under the Defence of India Act or the rules made thereunder. The Order is strict against the citizen but it is also strict against the authority. There can be no toleration of a pretence of using the Defence of India Act. The President's Order itself creates protection against things such as arbitrariness, misunderstood powers, mistake of identity by making his order apply only to cases where the detention is under the Act or the rules thereunder. No doubt, what *matters* is the substance but the form discloses the approach of the detaining authority to the serious question and the error in the form raises the enquiry about the substance. It is not every error in the order which will start such an enquiry. We have paid no attention to the error in the reference to the notification because that may well be a slip and power and jurisdiction is referable to the notification under which they would have validity. The other is not such a venial fault. It opens the door to enquiry what did the District Magistrate conceive to be his powers?

In proceeding to discuss this question we may consider a decision of the Court of Appeal in England in *Carltona Ltd. v. Commissioners of Works and others*¹. Curiously enough it was brought to our notice by Dr. Lohia and not by the other side. That case arose under Regulation 51 (1) of the Defence (General) Regulations in England during the last World War. The Regulation read :

"A competent authority, if it appears to that authority to be necessary or expedient so to do in the interests of the public safety, the defence of the realm or the efficient prosecution of the war, or for maintaining supplies and services essential to the life of the community, may take possession of any land, and may give such directions as appear to the competent authority to be necessary or expedient in connection with the taking of possession of that land."

There was an order against *Carltona Ltd.*, by the Commissioner of Works requisitioning the factory. The Order read :

"I have to inform you that the department have come to the conclusion that it is essential, in the national interest, to take possession of the above premises occupied by you."

It was objected on behalf of the Company that the mind was not directed to any one of the various heads mentioned in the Regulation which were put in the alternative. Lord Greene, M.R., speaking on behalf of Lord Goddard (then Lord Justice) and Lord du Parcq (then Lord Justice) observed :

"It was said that it was the duty of the person acting in the capacity of "a competent authority" to examine the facts of the case and consider under which, if any, of those various heads the matter came and it is said that the assistant secretary did nothing of the kind. It is to be observed that those heads are not mutually exclusive heads at all. They overlap at every point and many matters will fall under two or more of them, or under all four. I read the evidence as meaning that the assistant Secretary, seeing quite clearly that the case with which he was dealing and the need that he wished to satisfy was one which came under the regulation, did not solemnly sit down and ask himself whether it was for the efficient prosecution of the war that this storage was required for maintaining supplies and services essential to the life of the community. He took the view that it was required either for all those purposes, or, at any rate, for some of them, and I must confess it seems to me that it would have been a waste of time on the facts of this case for anyone seriously to sit down and ask himself under which particular head the case fell. He regarded, as I interpret his evidence, as falling under all the heads, and that may very well be having regard to the facts that these heads overlap in the way that I have mentioned. It seems to me, therefore, that there is no substance in that point, and his evidence makes it quite clear that he did bring his mind to bear on the question whether it appeared to him to be necessary or expedient to requisition this property for the purposes named, or some of them."

The case is distinguishable on more than one ground. To begin with, it dealt with an entirely different situation and different provision of law. No order in writing specifying satisfaction on any or all of the grounds was required. Detention under Regulation 18-B required an order just as detention under the Defence of India Act. The distinction between action under Regulation 51 and that under Regulation 18-B was noticed by the Court of Appeal in *Point of Ayr Collieries Ltd. v.*

*Lloyd George*¹, in the same volume at page 548. It is manifest that when property was requisitioned it would have been a futile exercise to determine whether the act promoted the efficient prosecution of the war, or the maintaining of supplies and services. But when a person is apprehended and detained it may be necessary to set out with some accuracy what he did or was likely to do within the provisions of rule 30, to merit the detention. The use of one phrase meaning a different thing in place of that required by the Act would not do, unless the phrase imported means the same thing as the phrase in the Act. Here the phrase used is maintenance of law and order and we must see how that phrase fits into the Rule which speaks of maintenance of "public order". The words "public order" were considered on some previous occasions in this Court and the observations made there are used to prove that maintenance of public order is the same thing as maintenance of law and order. We shall refer to some of these observations before we discuss the two phrases in the context of the Defence of India Rules.

Reliance is first placed upon a decision of the Federal Court in *Laksh Narayan Das v Province of Bihar*², where the Court dealing with item 1 of Provincial List, 7th Schedule in the Government of India Act, 1935 which read—

"Public order (but not including the use) of His Majesty's naval, military or air forces in aid of the civil power",

observed that "Public Order" with which that item began was "a most comprehensive term". Reference is also made to *Ramesh Thapar v State of Madras*³, where this Court dealing with the same subject matter also observed

" 'Public order' is an expression of wide connotation and signifies that state of tranquillity which prevails among the members of a political society as a result of internal regulations enforced by the Government which they have established. It must be taken that 'public safety' is used as a part of the wider concept of public order.

and referring to Entry in List III (Concurrent List) of the 7th Schedule of the Constitution which includes the "security of a State" and "maintenance of public order" as distinct topics of legislation, observed—

" The Constitution thus requires a line to be drawn in the field of public order or tranquillity marking off may be, roughly, the boundary between those serious and aggravated forms of public disorder which are circulated to endanger the security of the State and the relatively minor breaches of the peace of a purely local significance, treating for this purpose differences in degree as if they were differences in kind."

Fazl Ali, J, took a different view which he had expressed more fully in *Brybhushan and another v The State of Delhi*⁴, but he also observed that "public safety" had, as a result of a long course of legislative practice, acquired a well recognised meaning and was taken to denote safety or security of the State and that the expression "public order" was wide enough to cover small disturbances of the peace which do not jeopardise the security of the State and paraphrased the words "public order" as "public tranquillity".

Both the aspects of the matter were again before this Court in *The Superintendent, Central Prison, Fatehgarh v Ram Manohar Lohia*⁵, when dealing with the wording of clause (2) of Article 19 as amended by the Constitution (First Amendment) Act, 1951, it fell to be decided what "public order" meant. Subbarao, J, speaking for the Court referred to all earlier rulings and quoting from them came to the conclusion that "public order" was equated with public peace and safety and said.

" Presumably in an attempt to get over the effect of these two decisions, the expression 'public order' was inserted in Article 19 (2) of the Constitution by the Constitution (First Amendment) Act, 1951, with a view to bring in offences involving breach of purely local significance within the scope of Article 19.

Summing up the position as he gathered from the earlier cases, the learned Judge observed.

1 (1943) 2 All E.R. 546 (C.A.)
2 (1950) 1 M.L.J. 760 (1950) S.C.J. 32
(1949) F.O.R. 693 at 704
3 (1950) S.C.R. 594 at 598 (1950) 2 M.L.J.

390 (1950) S.C.J. 418
4 (1950) 2 M.L.J. 431 (1950) S.C.J. 425
(1950) S.G.R. 603
5 (1950) 2 S.C.R. 821

"..... 'Public order' is synonymous with public safety and tranquillity : it is the absence of disorder involving breaches of local significance in contradistinction to national upheavals, such as revolution, civil strife, war, affecting the security of the State ;"

These observations determine the meaning of the words "public order" in contradistinction to expressions such as "public safety", "security of the State". They were made in different contexts. The first three cases dealt with the meaning in the legislative Lists as to which, it is settled, we must give as large a meaning as possible. In the last case the meaning of "public order" was given in relation to the necessity for amending the Constitution as a result of the pronouncements of this Court. The context in which the words were used was different, the occasion was different and the object in sight was different.

We have here a case of detention under rule 30 of the Defence of India Rules which permits apprehension and detention of a person likely to act in a manner prejudicial to the maintenance of public order. It follows that if such a person is not detained public disorder is the apprehended result. Disorder is no doubt prevented by the maintenance of law and order also but disorder is a broad spectrum which includes at one end small disturbances and at the other the most serious and cataclysmic happenings. Does the expression "public order" take in every kind of disorders or only some of them ? The answer to this serves to distinguish "public order" from "law and order" because the latter undoubtedly takes in *all* of them. Public order, if disturbed, must lead to public disorder. Every breach of the peace does not lead to public disorder. When two drunkards quarrel and fight there is disorder but not public disorder. They can be dealt with under the powers to maintain law and order but cannot be detained on the ground that they were disturbing public order. Suppose that the two fighters were of rival communities and one of them tried to raise communal passions. The problem is still one of law and order but it raises the apprehension of public disorder. Other examples can be imagined. The contravention of law always affects order but before it can be said to affect public order, it must affect the community or the public at large. A mere disturbance of law and order leading to disorder is thus not necessarily sufficient for action under the Defence of India Act but disturbances which subvert the public order are. A District Magistrate is entitled to take action under rule 30 (1) (b) to prevent subversion of public order but not in aid of maintenance of law and order under ordinary circumstances.

It will thus appear that just as "public order" in the rulings of this Court (earlier cited) was said to comprehend disorders of less gravity than those affecting "security of State", "law and order" also comprehends disorders of less gravity than those affecting "public order". One has to imagine three concentric circles. Law and order represents the largest circle within which is the next circle representing public order and the smallest circle represents security of State. It is then easy to see that an act may affect law and order but not public order just as an act may affect public order but not security of the State. By using the expression "maintenance of law and order" the District Magistrate was widening his own field of action and was adding a clause to the Defence of India Rules.

We do not know the material on which the District Magistrate acted. If we could examine the reasons we may be able to say whether the action can still be said to fall within the other topic public safety. That enquiry is not open to us. If we looked into the matter from that angle we would be acting outside our powers. The order on its face shows two reasons. There is nothing to show that one purpose was considered to be more essential than the other. We are not, therefore, certain that the District Magistrate was influenced by one consideration and not both. The order of detention is a warrant which authorises action. Affidavits hardly improve the order as it is. If there is allegation of bad faith they can be seen to determine the question of good faith. If mistaken identity is alleged we can satisfy ourselves about the identity. But if action is taken to maintain law and order instead of maintaining public order, there is room to think that the powers were misconceived and if there is such a fundamental error then the action remains vulnerable. It will not be possible to say that although maintenance of law and order

were specified, what was considered was the problem of maintenance of public order. The error is an error of a fundamental character and unlike quoting a wrong notification. It is thus apparent why one error in the order of detention is admitted but not the other, and why with elaborate arguments it is attempted to establish that "public order" involves elements more numerous than "law and order" where, in fact, the truth is the other way.

It may be mentioned that Dr Lohia claimed that the satisfaction of the President under Article 359 is open to scrutiny of the Court. We have not allowed him to argue this point which is now concluded by rulings of this Court.

In our judgment the order of the District Magistrate exceeded his powers. He proposed to act to maintain law and order and the order cannot now be read differently even if there is an affidavit the other way. We have pondered deeply over this case. The action of the District Magistrate was entirely his own. He was, no doubt, facing a law and order problem but he could deal with such a problem through the ordinary law of the land and not by means of the Defence of India Act and the Rules. His powers were limited to taking action to maintain public order. He could not, run the law and order problems in his District by taking recourse to the provisions for detention under the Defence of India Act. If he thought in terms of 'public order' he should have said so in the order or explained how the error arose. He does neither. If the needs of public order demand action a proper order should be passed. The detention must, therefore, be declared to be outside the Defence of India Act, 1962 and the Rules made thereunder. Dr Lohia is entitled to be released from custody and we order accordingly.

Raghubar Dayal J—In this writ petition Dr Lohia challenges the validity of the order made by the District Magistrate, Patna dated 9th August, 1965, under clause (b) of sub-rule (1) of rule 30 of the Defence of India Rules, 1962, hereinafter called the Rules. This order is as follows:

Whereas I J N Sahu District Magistrate Patna am satisfied with respect to the person known as Dr Ram Manohar Lohia, Circuit House Patna that with a view to preventing him from acting in any manner prejudicial to the public safety and the maintenance of law and order it is necessary to make an order that he be detained.

Now therefore in the exercise of the powers conferred by clause (b) of sub-rule (1) of rule 30 of the Defence of India Rules 1962 read with Notification No. 120/GW dated the 20th March 1964 of the Government of Bihar Political (Special) Department I hereby direct that the said Dr Ram Manohar Lohia be arrested by the police wherever found and detained in the Central Jail Hazaribagh until further orders.

If this order is valid Dr Lohia cannot move this Court for the enforcement of his rights conferred by Articles 21 and 22 of the Constitution in view of the Order of the President dated 3rd November 1962, in the exercise of powers conferred on him by clause (1) of Article 359 of the Constitution.

Dr Lohia has challenged the validity of this order on several grounds. I agree with the views expressed by Hidayatullah, J., about all the contentions except one. That contention is that the appropriate authority is not empowered to order detention with a view to prevent a person from acting in any way prejudicial to the maintenance of law and order. It is urged that though the District Magistrate could order the detention of the petitioner with a view to prevent him from acting in any way prejudicial to the public safety and the maintenance of public order he could not order detention with a view to prevent the petitioner from acting prejudicially to the public safety and maintenance of law and order, as the latter object, being not synonymous with the object to preventing him from acting prejudicial to public order is outside the purview of the provisions of rule 30 (1) of the rules and that therefore the entire order is bad. I do not agree with this contention.

Under rule 30 (1) (b) the District Magistrate could have made the order of detention with respect to Dr Lohia if he was satisfied that he be detained with a view to prevent him from acting in any manner prejudicial to public safety or maintenance of public order. Such satisfaction is subjective and not objective. The Court cannot investigate about the adequacy of the reasons which led to his satis-

faction. The Court can, however, investigate whether he exercised the power under rule 30 honestly and *bona fide* or not *i.e.*, whether he ordered detention on being satisfied as required by rule 30. What is crucial for the validity of the detention order is such satisfaction and not the form in which the detention order is framed. A detainee can question the validity of the detention order—valid on its face—on various grounds including that of *mala fides*. The onus will be on him to prove *mala fides*. He can question the validity of the detention order on the same ground when, on its face, it appears to be invalid. In such a case the onus will be on the detaining authority to establish that it was made *bona fide*.

An order is made *mala fide* when it is not made for the purpose laid down in the Act or the rules and is made for an extraneous purpose. The contention of the petitioner to the effect that the detention order cannot be made on the satisfaction of the detaining authority that it is necessary to prevent him from acting in a manner prejudicial to the maintenance of law and order, in effect, amounts to the contention that it is made *mala fide*.

The detaining authority is free to establish that any defect in the detention order is of form only and not of substance, it being satisfied of the necessity to detain the person for a purpose mentioned in rule 30 though the purpose has been inaccurately stated in the detention order. The existence of the satisfaction required by rule 30 does not depend on what is said in the detention order, and can be established by the District Magistrate by his affidavit. We have therefore to examine whether the District Magistrate was really satisfied about the necessity to detain Dr. Lohia with a view to prevent him from acting in a manner prejudicial to public safety and maintenance of public order.

The impugned order was passed under rule 30 (1) (b) of the Rules. The District Magistrate decided to detain the petitioner with two objects. firstly, to prevent him from acting in any way prejudicial to public safety and, secondly, to prevent him from acting in any way prejudicial to the maintenance of law and order. The District Magistrate has—even in the absence of any such contention as under discussion and which was raised after the filing of the District Magistrate's affidavit—said that having regard to, *inter alia*, the circumstances which were developing in Patna on 9th August, 1965, he was fully satisfied, in view of the report made by the Senior Superintendent of Police, Patna, in regard to Dr. Lohia's conduct and activities, that it was necessary to direct that he be detained in order to prevent him from acting further in any manner prejudicial to the public safety and maintenance of public order. There is no reason to disbelieve his statement. His original order, set out below, bears out this statement of his in his later affidavit:

"Perused the report of the Senior S.P., Patna for detention of Dr. Ram Manohar Lohia, M.P. under rule 30 (1) (b) of the Defence of India Rules, on the ground that his being at large is prejudicial to the public safety and maintenance of public order. From the report of the senior S.P., Patna, I am satisfied that Dr. Ram Manohar Lohia, M.P., aforesaid, be detained under rule 30 (1) (b) of the Defence of India Rules. Accordingly, I order that Dr. Ram Manohar Lohia be detained under rule 30 (1) (b) of the Defence of India Rules read with Notification No. 180/C.W., dated 20th March, 1964 in the Hazaribagh Central Jail until further orders."

The District Magistrate's omission to repeat in the second sentence where he speaks of his satisfaction that Dr. Lohia be detained with a view to preventing him from acting prejudicially to the public safety and maintenance of public order, does not mean that he was not so satisfied when the earlier sentence makes reference to the report of the Senior Superintendent of Police for detaining Dr. Lohia on the ground of his being at large to be prejudicial to public safety and maintenance of public order.

The District Magistrate referred, in para. 3 of his affidavit, to his satisfaction that the forces of disorder which were sought to be let loose, if not properly controlled, would envelope the whole State of Bihar and possibly might spread in other parts of the country which would necessarily affect the problem of external defence as well in more ways than one. The possibilities of such forces of disorder spreading to other parts of the country satisfied him with the necessity of taking immediate action to neutralize those forces. It appears from his statements in paragraphs 6 and

7 of the same affidavit that actual disturbances took place at Patna that day and that he had to operate from the Control Room. In paragraph 9 he states that the action taken against Dr Lohia was purely for the purpose of maintenance of public peace in the circumstances stated by him earlier.

In his rejoinder affidavit Dr Lohia states with reference to the alleged forces of disorder referred to by the District Magistrate that even if he was promoting what the Executive would call 'forces of disorder,' he was doing so not with a view to impair the defences of the country but further to strengthen them that the various allegations made against him were extraneous to the scope and purpose of the legislative provisions of the proclamations of emergency which had no rational relationship to the circumstances which were developing in Patna on 9th August, 1965. Even in his original affidavit Dr Lohia stated in paragraph 6 that

It is also revealing to note that after the events of the 9th August for which responsibility should have been sought to be fixed either through trial or enquiry on me or Government or anybody else I addressed a crowd of nearly a lakh for over an hour after seven in the evening.

The setting of the events that appear to have happened at Patna on 9th August 1965¹ further bear out the statement of the District Magistrate that he was satisfied of the necessity to detain Dr Lohia in order to prevent him from acting in a manner prejudicial to public order.

Further, the expression 'maintenance of law and order' is not used in clause (1) of rule 30. The corresponding expression used therein is 'maintenance of public order'. The two expressions are not much different. The expression 'public order' has been construed by this Court in a few cases, the latest of them being *The Superintendent, Central Prison, Fatehgarh v Ram Mahonar Lohia*², where it was said at page 839

'Public order' is synonymous with public safety and tranquillity. It is the absence of disorder involving breaches of local significance in contradistinction to national upheavals such as revolution, civil strife, war, affecting the security of the State.

The expression 'maintenance of law and order' would cover 'maintenance of public safety and tranquillity'. It may be as urged for the petitioner, an expression of wider import than public order but, in the context in which it is used in the detention order and in view of its use generally, it should be construed to mean maintenance of law and order in regard to the maintenance of public tranquillity. It is not usually used merely with reference to enforcement of law by the agency of the State prosecuting offenders against any of the numerous laws enacted for the purposes of a well regulated society. Simple and ostensibly minor incidents at times lead to widespread disturbances affecting public safety and tranquillity.

Reference may be made to the case reported as *Sodhi Shamsher Singh v State of Punjab*³. In that case certain persons were detained under an order under section 3 (1) of the Preventive Detention Act, 1950, on grounds which, in substance, were that one of them had published certain pamphlets whose circulation in the opinion of the Government, tended to encourage the Sikhs to resort to acts of lawlessness and plunge the Hindus into a feeling of utter frustration and discouragement and consequently to make them take the law into their hands for the redress of their grievances. Section 3 (1) of the Preventive Detention Act, 1950, reads

'The Central Government or the State Government may—

(a) if satisfied with respect to any person that with a view to preventing him from acting in any manner prejudicial to—

- (i) the defence of India, the relations of India with foreign powers or the security of India or
- (ii) the security of the State or the maintenance of public order or
- (iii)

(b) , make an order directing that such person be detained'

This Court used the expression 'maintenance of law and order' in place of 'maintenance of public order' used in section 3 (1) (a) (ii) at three places in paragraphs 4 and 5 of the judgment. I do not refer to these to show that the Court has construed the expression 'maintenance of public order' as 'maintenance of law and order' but to reinforce my view that the expression 'maintenance of law and order' is generally used for 'maintenance of public safety and tranquillity' which is covered by the expression 'public order.' When this Court used this expression in place of 'maintenance of public order' I cannot conclude, as urged by the petitioner, that the District Magistrate's using the expression 'maintenance of law and order' in place of 'maintenance of public order' is any indication of the fact that he had not applied his mind to the requirements of the provisions of rule 30 (1) or had not actually come to the conclusion that it was necessary to detain Dr. Lohia with a view to prevent him from acting in any manner prejudicial to the maintenance of public order.

If the expression 'maintenance of law and order' in the impugned order be not construed as referring to 'maintenance of public order' the impugned order cannot be said to be invalid in view of its being made with a double objective, i.e., with the object of preventing Dr. Lohia from acting prejudicially to the public safety and from acting prejudicially to the maintenance of law and order. If the District Magistrate was satisfied, as the impugned order and the affidavit of the District Magistrate show that he was satisfied that it was necessary to detain Dr. Lohia with a view to preventing him from acting prejudicially to public safety, that itself would have justified his passing the impugned order. His satisfaction with respect to any of the purposes mentioned in rule 30 (1) which would justify his ordering the detention of a person is sufficient for the validity of the order. There is no room for considering that he might not have passed the impugned order merely with one object in view, the object being to prevent Dr. Lohia from acting prejudicially to public safety. The entire circumstances in which the order has been made and which I have referred to earlier, point to that.

The question before us is not really at par with the question that arose in *Romesh Thappar v. State of Madras*¹. In that case the provisions impugned were those of a statute whose language authorised the passing of orders which could be constitutional in certain circumstances and unconstitutional in others. In such a context, it was said that where a law purports to authorize the imposition of restrictions on a fundamental right in language wide enough to cover restrictions both within and without the limits of constitutionally permissible legislative action affecting such right, it is not possible to uphold it even so far as it may be applied within the constitutional limits, as it is not severable; so long as the possibility of its being applied for purposes not sanctioned by the Constitution cannot be ruled out, it must be held to be wholly unconstitutional and void. It was so held as, otherwise, the orders passed for purposes not sanctioned by the Constitution would have been in accordance with the law held valid. The validity of the orders passed under a valid law—the Defence of India Act and the Rules have to be assumed to be valid—depends on their being made by the appropriate authority in accordance with the law empowering it to pass the orders.

The question before us is also not at par with the question which often arises in construing the validity of detention orders passed under the Preventive Detention Act for the reason that some of the grounds for the satisfaction of the appropriate authority were irrelevant or non-existent. The presence of such grounds raised the question whether the remaining good grounds would have led the authority to the requisite subjective satisfaction for ordering detention. In the present case, however, the question is different. The question is whether the District Magistrate would have made the order of detention on his satisfaction merely to the effect that it was necessary to detain Dr. Lohia with a view to prevent him from acting in a manner prejudicial to public safety. It is not that his satisfaction is based on two grounds, one of which is irrelevant or non-existent.

¹ (1950) S.C.J. 418 : (1950) 2 M.L.J. 390 : (1950) S.C.R. 594.

Even in such cases, this Court has held in *Dwarka Das v. State of J. & K.*¹

"The principle underlying all these decisions is this: Where power is vested in a statutory authority to deprive the liberty of a subject on its subjective satisfaction with reference to specified matters, if that satisfaction is stated to be based on a number of grounds or for a variety of reasons, all taken together, and if some out of them are found to be non-existent or irrelevant, the very exercise of that power is bad. That is so because the matter being one for subjective satisfaction, it must be properly based on all the reasons on which it purports to be based. If some out of them are found to be non-existent or irrelevant, the Court cannot predicate what the subjective satisfaction of the said authority would have been on the exclusion of those grounds or reasons. To uphold the validity of such an order in spite of the invalidity of some of the reasons or grounds would be to substitute the objective standards of the Court for the subjective satisfaction of the statutory authority. In applying these principles, however, the Court must be satisfied that the vague or irrelevant grounds are such as, if excluded, might reasonably have affected the subjective satisfaction of the appropriate authority. It is not merely because some ground or reason of a comparatively unessential nature is defective that such an order based on subjective satisfaction can be held to be invalid."

As stated earlier, there does not appear to be any reason why the District Magistrate would not have passed the order of detention against Dr. Lohia on his satisfaction that it was necessary to prevent him from acting prejudicially to public safety. On such satisfaction, it was incumbent on him to pass the order and he must have passed it.

I am therefore of opinion that the District Magistrate made the impugned detention order on his being satisfied that it was necessary to do so with a view to prevent Dr. Lohia from acting in a manner prejudicial to public safety and maintenance of public order and that the impugned order is valid. Consequently, Dr. Lohia cannot move this Court for the enforcement of his rights under Articles 21 and 22 of the Constitution in view of the President's Order under Article 359 (1) of the Constitution. I would dismiss this petition.

Mudholkar, J.—I agree that the petition of Dr. Ram Manohar Lohia under Article 32 of the Constitution be granted and would briefly indicate my reasons for granting it.

At the outset I shall consider an objection of Mr. S. P. Varma on behalf of the State as to the tenability of the petition. The objection is two-fold. In the first place, according to him, in view of the Proclamation made by the President under Article 359 this Court has no jurisdiction to entertain it. In the second place his contention is that the order of detention made against the petitioner being one under the Defence of India Rules, he cannot challenge the validity of his detention thereunder in any Court. In support of these contentions Mr. Varma relies on the decision of this Court in *Mohan Choudhury v. Chief Commissioner, Tripura*². In that case this Court has while holding that the right of a person whose detention has been ordered under the Defence of India Rules to move any Court for the enforcement of his rights under Article 21 of the Constitution is suspended during the continuance of the emergency declared by the President by a Proclamation under Article 352, held that the powers conferred on this Court by Article 32 of the Constitution are not suspended. It is true that where a person has been detained under the Defence of India Rules he cannot move this Court under Article 32 for the enforcement of his right under Article 21 and so there will be no occasion for this Court to exercise its powers under that article in such a case. But what would be the position in a case where an order for detention purporting to be made under the Defence of India Rules was itself one which was beyond the scope of the Rules? For before an entry into the portals of this Court can be denied to a detenu he must be shown an order under rule 30 (1) of the Defence of India Rules made by a competent authority stating that it is satisfied that the detenu is likely to indulge in activities which will be prejudicial to one or more of the matters referred to in the rule. If the detenu contends that the order, though it purports to be under rule 30 (1) of the Rules, was not competently made, this Court has the duty to enquire into the matter. Upon an examination of the order if the Court finds that it was not competently made or was ambiguous it must exercise its powers under Article

32 of the Constitution, entertain his petition thereunder and make an appropriate order.

In this case the District Magistrate, Patna purported to make an order under rule 30 (1) of the Defence of India Rules. The State has placed on record copies of two orders : one is said to have been recorded by the District Magistrate on his file and another which was served on Dr. Lohia. We are not concerned with the former because the operative order must be the one served on the detenu. The District Magistrate may well keep the former in the drawer of his table or alter it as often as he likes. It cannot, therefore, be regarded as anything more than a draft order. The order which finally emerged from him and was served on the detenu would thus be the only one which matters. The grounds for detention given in the latter order, are that Dr. Lohia's being at large is prejudicial to public safety and maintenance of public order. Under rule 30 (1) an order of detention of a person can be made

"with a view to preventing him from acting in any manner prejudicial to the defence of India and civil defence, public safety, the maintenance of public order, India's relations with foreign powers, the maintenance of peaceful conditions in any part of India, the efficient conduct of military operations or the maintenance of supplies and services essential to the life of the community".

I find it difficult to accept Dr. Lohia's argument that the appropriate authority must entertain an apprehension that the person to be detained is likely to participate in every one of the activities referred to in the rule. To accept it would be, apart from making a departure from the rules of grammar (for doing which no valid grounds exist), making not only the rule in question but also section 3 of the Defence of India Act where similar language is used almost ineffective. What has, however, to be considered is his other argument. The question posed by the argument is whether an authority competent to make an order under the aforesaid provision can make such an order on the ground that the authority feels it necessary to prevent a person from acting in any manner prejudicial to the maintenance of law and order. The expression "law and order" does not find any place in the rule and is not synonymous with "public order". It seems to me that "law and order" is a comprehensive expression in which would be included not merely public order, but matters such as public peace, tranquillity, orderliness in a locality or a local area and perhaps some other matters. "Public order" is something distinct from order or orderliness in a local area. Under rule 30 (1) no power is conferred upon that authority to detain a person on the ground that it is necessary so to do in order to prevent that person from acting in a manner prejudicial to the maintenance of order in a local area. What is it that the District Magistrate, Patna, had in mind when he ordered the detention of the petitioner? Was the apprehension entertained by the District Magistrate that Dr. Lohia, if left at large, was likely to do something which will imperil the maintenance of public order generally or was it that he apprehended that Dr. Lohia's activities may cause disturbances in a particular locality? There is thus an ambiguity on the face of the order and, therefore, the order must be held to be bad. No doubt, the order also refers to the apprehension felt by the District Magistrate about Dr. Lohia's acting in a manner prejudicial to public safety. But then the question arises: what is it that weighed with the District Magistrate, the apprehension regarding public safety or an apprehension regarding the maintenance of law and order? Again would the District Magistrate have made the order solely on the ground that he felt apprehension regarding the maintenance of public safety because of the activities in which he thought Dr. Lohia might indulge? It could well be that upon the material before him the District Magistrate would have refrained from making an order under rule 30 solely upon the first ground. Or on the other hand he would have made the order solely upon that ground. His order, however, which is the only material on the basis of which we can properly consider the matter gives no indication that the District Magistrate would have been prepared to make it only upon the ground relating to public safety. In the circumstances I agree with my brethren Sarkar and Hidayatullah that the order of detention cannot be sustained. I have not referred to any decisions because they have already been dealt with

fully in the judgments of my learned brethren In the result, therefore, I allow the petition and direct that Dr Lohia be set at liberty

ORDER OF THE COURT—In view of the majority opinion, we allow the petition and order that the petitioner be set at liberty

V.K.

Petition allowed.

THE SUPREME COURT OF INDIA

(Civil Appellate Jurisdiction)

PRESENT —K SUBBA RAO, M HIDAYATULLAH AND R S BACHAWAT, JJ.

S Rama Iyer (deceased) thereafter his heirs and legal representatives

*Appellants**

Sundaresa Ponnappaondar

Respondent

Madras Cultivating Tenants Protection Act (XXV of 1955), section 6 B—Revisional jurisdiction of High Court—Power to interfere with finding of collateral fact—Finding that a person applying is not a cultivating tenant and refusing application—If liable to interference in revision

Civil Procedure Code (V of 1908) section 115—Scope

Where the Tribunal found summarily that the applicant was not a cultivating tenant of the respondent and on such a finding declined to exercise the jurisdiction vested in it by section 3 (3) of the Madras Cultivating Tenants Protection Act 1955 to determine the correct rent due to the landlord (respondent) by the applicant the High Court had power to enquire into the correctness of this decision and on finding that the tenancy existed and the Tribunal had erroneously refused to exercise the jurisdiction vested in it by section 3 (3) the High Court could set aside the decision under sub-section (b) of section 115 of the Code of Civil Procedure read with section 6-B of the Cultivating Tenants Protection Act The High Court can on a review of the entire evidence come to the conclusion that the applicant was a cultivating tenant and grant relief accordingly

Appeal by Special Leave from the Judgment and Order, dated the 27th March, 1959, of the Madras High Court in C.R.P No 1282 of 1958

R Ganapathy Iyer, Advocate, for Appellants

R Thiagarajan, Advocate, for Respondent

The Judgment of the Court was delivered by

Bachawat, J—On 24th April, 1958, the respondent claiming to be the cultivating tenant of the appellant in respect of certain lands in Manapparavai vattam, Nannilam taluk deposited Rs 462 as rent for 1367 fash in the Revenue Court (the Court of the Revenue Divisional Officer), Tanjore, under section 3 (3) of the Madras Cultivating Tenants Protection Act, 1955 (Madras Act XXV of 1955) and filed an application before the Court praying for a declaration that the amount deposited represented the correct amount of rent due from him The appellant denied that the respondent was his cultivating tenant On 31st July, 1958, the Revenue Court, Tanjore held that the respondent was not a cultivating tenant of the appellant and could not claim the benefit of section 3 (3) and dismissed the application The respondent filed a petition in revision before the Madras High Court under section 6 B of the Act read with section 115 of the Code of Civil Procedure The High Court came to the conclusion that the respondent was a cultivating tenant of the appellant and by its order dated 27th March, 1959, allowed the revision petition and declared that the amount deposited by the respondent represented the correct amount due from him to the appellant The appellant now appeals to this Court by Special Leave.

Counsel for the appellant submitted that the finding of the Revenue Court that the respondent was not a cultivating tenant was a finding of fact and the High Court had no jurisdiction to set it aside on revision On the other hand, Counsel for the respondent submitted that the finding was in respect of a collateral fact upon the existence of which the jurisdiction of the Revenue Court under section

3. (3) depended; and the High Court had ample power to revise the finding under section 6-B of the Act. Section 6-B is in these terms :

"The Revenue Divisional Officer shall be deemed to be a Court subordinate to the High Court for the purposes of section 115 of the Code of Civil Procedure, 1908 (Central Act V of 1908), and his orders shall be liable to revision by the High Court under the provisions of that section."

Section 6-B empowers the High Court to revise the decision of the Revenue Divisional Officer under section 115 of the Code of Civil Procedure, and for the purposes of the section, the Officer is deemed to be a subordinate Court. Section 115 is in these terms :

"The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate Court appears—

(a) to have exercised a jurisdiction not vested in it by law, or

(b) to have failed to exercise a jurisdiction so vested, or

(c) to have acted in the exercise of its jurisdiction illegally or with material irregularity, the High Court may make such order in the case as it thinks fit."

In the present case, no question of revision under sub-section (c) of section 115 arises, and we are concerned only with the power of revision under sub-sections (a) and (b) of section 115. Sub-section (a) empowers the High Court to correct an erroneous assumption of jurisdiction; sub-section (b) empowers it to correct an erroneous refusal of jurisdiction. The decision of the subordinate Court on all questions of law and fact not touching its jurisdiction is final and however erroneous such a decision may be, it is not revisable under sub-sections (a) and (b) of section 115. On the other hand, if by an erroneous decision on a question of fact or law touching its jurisdiction, e.g., on a preliminary fact upon the existence or which its jurisdiction depends, the subordinate Court assumes a jurisdiction not vested in it by law or fails to exercise a jurisdiction so vested, its decision is not final, and is subject to review by the High Court in its revisional jurisdiction under sub-sections (a) and (b) of section 115. The question is, on which side of the line the present case lies, and whether the decision of the Revenue Divisional Officer that the respondent is not a cultivating tenant of the appellant is subject to review by the High Court in its revisional jurisdiction. The Revenue Divisional Officer is an inferior Court of limited jurisdiction functioning under the Madras Cultivating Tenants Protection Act, 1955. To ascertain the limit and extent of its jurisdiction, we must examine the provisions of the Act.

The Act came into force on 27th September, 1955, and was amended from time to time. Originally, the Act was temporary, recently it has been made permanent. The Act was passed for the protection of certain cultivating tenants from eviction. Section 2 defines, *inter alia*, 'cultivating tenant' and 'landlord'. 'Cultivating tenant' is a person who carries on personal cultivation on the land under a tenancy agreement, express or implied, and includes any person who continues in possession of the land after determination of the tenancy agreement and the heirs of such person. "Landlord" means the person entitled to evict the cultivating tenant from his holding or a part of it. Section 3 (1) protects the cultivating tenant from eviction at the instance of the landlord whether in execution of a decree or order of Court or otherwise. Section 3 (2) sets out the grounds of eviction, and if one of these grounds is made out, the protection from eviction given by section 3 (1) is taken away. Section 3 (3) enables the cultivating tenant to deposit the rent in Court. Section 3 (3) (b) requires the Court to "cause notice of the deposit to be issued to the landlord and determine, after a summary enquiry, whether the amount deposited represents the correct amount of rent due from the cultivating tenant". The expression "Court" in section 3 (3) means the Court which passed the decree for order for eviction, or where there is no such decree or order, the Revenue Divisional Officer. The Act also vests jurisdiction in the Revenue Divisional Officer to entertain and decide an application by the landlord for eviction of a cultivating tenant—section 3 (4), an application by cultivating tenants evicted before and after the commencement of the Act for restoration of possession—sections 4 (1) and 4 (5), an application by the

landlord for the resumption of land for personal cultivation—section 4 A (1), an application by the cultivating tenant for restoration of possession from a landlord so resuming possession—section 4 A (2), applications for resumption of possession by the landlord from his cultivating tenant and by the cultivating tenant from his sub-tenant provided the applicant was a member of the Armed Forces—sections 4-AA (2) and 4 AA(3) On receipt of any application under sections 3 (4), 4 (1), 4 (5), 4-A (1), 4-A (2), 4 AA (2) and 4 AA (3) the Revenue Divisional Officer is required to hold a summary enquiry into the matter and pass necessary orders after giving a reasonable opportunity to the landlord and the tenant to make their representations Section 4 B empowers the Revenue Divisional Officer in the case of any tenancy to impose a penalty on the landlord or the cultivating tenant for his refusal to sign or failure to lodge a lease deed in accordance with its provisions Section 6 provides that no Civil Court shall, except to the extent specified in section 3(3), have jurisdiction in respect of any matter which the Revenue Divisional Officer is empowered by or under the Act to determine, or shall grant an injunction in respect of any action taken or to be taken under such power Section 6 A requires the Civil Court to transfer to the Revenue Divisional Officer any suit for possession or injunction in relation to any land pending before it if it is satisfied that the defendant is a cultivating tenant We have already noticed section 6 B which confers powers of revision on the High Court Section 7 gives the State Government the power to make Rules

The Act gives generous protection to cultivating tenants from eviction, and severely restricts the right of landlords to resume possession of their land from their cultivating tenants In case of disputes between the landlord and the cultivating tenant, the Revenue Divisional Officer is authorised to entertain and decide applications by the landlord for eviction and resumption of possession and by the cultivating tenant for restoration of possession and to impose penalties on the landlord or the tenant for infraction of section 4-B To attract the jurisdiction of the Revenue Divisional Officer, there must be a dispute between a landlord and cultivating tenant The existence of the relation of landlord and cultivating tenant between the contending parties is the essential condition for the assumption of jurisdiction by the Revenue Divisional Officer in all proceedings under the Act The Tribunal can exercise its jurisdiction under the Act only if such relationship exists If the jurisdiction of the Tribunal is challenged, it must enquire into the existence of the preliminary fact and decide if it has jurisdiction But its decision on the existence of this preliminary fact is not final, such a decision is subject to review by the High Court in its revisional jurisdiction under section 6-B The enquiry by the Tribunal is summary, there is no provision for appeal from its decision and the Legislature could not have intended that its decision on this preliminary fact involving a question of title would be final and not subject to the overriding powers of revision by the High Court

In the present case, the Tribunal found that the respondent was not the cultivating tenant of the appellant and on such finding declined to exercise the jurisdiction vested in it by section 3 (3) to determine the correct amount of rent due by the respondent to the appellant The High Court had power to enquire into the correctness of this decision and on finding that the tenancy existed and the Tribunal had erroneously refused to exercise the jurisdiction vested in it by section 3 (3), the High Court could set aside the decision under sub-section (b) of section 115 of the Code read with section 6 B of the Act On a review of the entire oral and documentary evidence, the High Court found that the respondent was the cultivating tenant of the appellant It is not shown that this finding is erroneous We see no reason for interfering with the decision of the High Court

The appeal is dismissed. There will be no order as to costs

K.S

Appeal dismissed

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—P. B. GAJENDRAGADKAR, *Chief Justice*, K. N. WANCHOO, M. HIDAYATULLAH AND V. RAMASWAMI, JJ.

Kedar Pandey (in both the Appeals)

.. Appellant*

v.

Narain Bikram Sah (in both the Appeals)

.. Respondent.

Constitution of India (1950), Articles 5 and 173—Domicile of origin and domicile of choice—Difference between—Domicile of choice—Acquisition of—Requisites—Proof—Relevant facts.

The law attributes to every person at birth a domicile which is called a domicile of origin. This domicile may be changed and a new domicile, which is called a domicile of choice, acquired; but the two kinds of domicile differ in one respect. The domicile of origin is received by operation of law at birth: the domicile of choice is acquired later by the actual removal of an individual to another country accompanied by his *animus manendi*. The domicile of origin is determined by the domicile, at the time of the child's birth, of that person upon whom he is legally dependent. A legitimate child born in a wedlock to a living father receives the domicile of the father at the time of the birth; a posthumous legitimate child receives that of the mother at that time. As regards change of domicile any person not under disability may at any time change his existing domicile and acquire for himself a domicile of choice by the fact of residing in a country other than that of his domicile of origin with the intention of continuing to reside there indefinitely. For this purpose residence is a mere physical fact and means no more than personal presence in a locality, regarded apart from any of the circumstances attending it. If this physical fact is accompanied by the required state of mind, neither its character nor its duration is in any way material. The state of mind, or *animus manendi*, which is required demands that the person whose domicile is the object of the inquiry should have formed a fixed and settled purpose of making his principal or sole permanent home in the country of residence, or in effect, he should have formed a deliberate intention to settle there. It is also well-established that the onus of proving that a domicile has been chosen in substitution for the domicile of origin lies upon those who assert that the domicile of origin has been lost. The domicile of origin continues unless a fixed and settled intention of abandoning the first domicile and acquiring another as the sole domicile is clearly shown.

Thus, the only intention required for a proof of a change of domicile is an intention of permanent residence. In other words, what is required to be established is that the person who is alleged to have changed his domicile of origin has voluntarily fixed the habitation of himself and his family, in the new country not for a mere special or temporary purpose, but with a present intention of making it his permanent home.

Udny v. Udny, L.R. 1 H.L. Sc. 441 and *Doucet v. Geoghegan*, L.R. 9 Ch. Div. 441, Relied on.

For the determination of the question of domicile of a person at a particular time, the course of his conduct and the facts and circumstances before and after that time are relevant.

In re *Grove Vaucher v. The Solicitor to the Treasury*, (1889) L.R. 40 Ch. D. 216, Relied on.

Where the election of the respondent to the Bihar Legislative Assembly was challenged on the ground that he was not a citizen of India:

Held, assuming that the respondent had his domicile of origin in Nepal, the events and circumstances of his life clearly showed that he had settled down in India with the intention of permanently establishing himself and his family in India and so had acquired a domicile of choice in Indian territory when Article 5 of the Constitution of India came into force and as it was established that he was ordinarily resident in India for 5 years immediately preceding the commencement of the Constitution of India, he was a citizen of India at the time of his election and as such was duly qualified for being elected to the Bihar Legislative Assembly.

Appeals from the Judgment and Decree, dated 26th March, 1964, of the Patna High Court in Election Appeals Nos. 8 and 10 of 1963.

C B Agarwala, Senior Advocate, (*Jagdish Pandey*, *Chinta Subbarao*, *M Raja-gopalan* and *B P Jha*, Advocates, with him), for Appellant (in both the Appeals)

K P Varma and *D Goburdhun*, Advocates, for Respondent (in both the Appeals)

The Judgment of the Court was delivered by

Ramaswami, J —Both these appeals are brought by certificate against the judgment and decree of the High Court of Judicature at Patna dated 26th March, 1964, pronounced in Election Appeals Nos 8 and 10 of 1963

The appellant—Kedar Pandey and the respondent—Narain Bikram Sah (hereinafter called Narain Raja) were the contesting candidates in the year 1962 on behalf of the Congress and Swatantra Party respectively for the election to Bihar Legislative Assembly from Ramnagar Constituency in the district of Champaran. The nomination papers of the appellant and the respondent and two others—Parmeshwar Prasad Roy and Suleman Khan—were accepted by the Returning Officer without any objection on 22nd January, 1962. Later on the two candidates—Parmeshwar Prasad Roy and Suleman Khan—withdrawed their candidature. After the poll the respondent, Narain Raja was declared elected as member of the Bihar Legislative Assembly by majority of valid votes. On 11th April 1962, Kedar Pandey filed an election petition challenging the election of the respondent. It was alleged by Kedar Pandey that the respondent was not duly qualified under Article 173 of the Constitution of India to be a candidate for election as he was not a citizen of India. According to Kedar Pandey the respondent, his parents and grand parents were all born in Nepal and, therefore, on the date of the election, the respondent—Narain Raja—was not qualified to be chosen to fill the Assembly seat for which he had been declared to have been elected. According to Kedar Pandey the respondent was related to the Royal family of Nepal and the father of the respondent—Rama Raja—owned about 43 bighas of land and a house of Barewa in Nepal in which the respondent had a share along with his three other brothers. The election petition was contested by the respondent who said that he was an Indian citizen and there was no disqualification incurred under Article 173 of the Constitution. The further case of the respondent was that he had lived in India since his birth and that he was a resident of Ramnagar in the district of Champaran and not of Barewa in Nepal. The respondent claimed that he was born in Banaras and not at Barewa.

Upon these rival contentions it was held by the Tribunal that the respondent—Narain Raja—was not a citizen of India and, therefore, was not qualified under Article 173 of the Constitution for being chosen to fill a seat in the Bihar Legislative Assembly. The Tribunal, therefore, declared that the election of the respondent was void. But the Tribunal refused to make a declaration that Kedar Pandey was entitled to be elected to Bihar Legislative Assembly for that constituency. Both the appellant and the respondent preferred separate appeals against the judgment of the Election Tribunal to the High Court of Judicature at Patna. The High Court in appeal set aside the judgment of the Tribunal and upheld the election of the respondent—Narain Raja. The High Court found, on examination of the evidence, that Narain Raja, the respondent before us was born in Banaras on 10th October, 1918, and that the respondent was living in India from 1939 right upto 1949 and even thereafter. The High Court further found that long before the year 1949 Narain Raja had acquired a domicile of choice in Indian territory and, therefore acquired the status of a citizen of India both under Article 5 (a) and (c) of the Constitution. On these findings the High Court took the view that Narain Raja was duly qualified for being elected to the Bihar Legislative Assembly and the election petition filed by the appellant—Kedar Pandey—should be dismissed.

The main question arising for decision in this case is whether the High Court was right in its conclusion that the respondent—Narain Raja—was a citizen of India under Article 5 of the Constitution of India on the material date.

The history of the family of Narain Raja is closely connected with the history of Ramnagar estate. It appears that Ramnagar estate in the district of Champaran in Bihar originally belonged to Shri Prahlad Sen after whose death the estate came into the possession of Shri Mohan Vikram Sah, popularly known as Mohan Raja. After the death of Mohan Raja the estate came into the possession of Rani Chhatra Kumari Devi, the widow of Mohan Raja and after the death of Rani Chhatra Kumari Devi, the estate came into the possession of Rama Raja *alias* Mohan Bikram Sah, the father of the respondent—Narain Raja. It is in evidence that the daughter of Prahlad Sen was married to Shri Birendra Vikram Sah, the father of Mohan Raja. Mohan Raja died without any male issue but during his lifetime he had adopted Rama Raja, the father of the respondent and by virtue of a will executed by Mohan Raja in the year 1904 in favour of his wife Rani Chhatra Kumari Devi the Rani became entitled to the Ramnagar estate on the death of Mohan Raja (which took place in 1912), in preference to the adopted son Rama Raja since the properties belonged to Mohan Raja in his absolute right and not as ancestral properties. After the death of Rani Chhatra Kumari Devi in 1937 Rama Raja came into the possession of the Ramnagar estate. In the year 1923 Rani Chhatra Kumari Devi had filed R.S. No. 4 of 1923 against Rama Raja in the Court of Sub-Judge, Motihari with regard to a village which Rama Raja held in Ramnagar estate on the basis of a Sadhwa Patwa lease. Rama Raja in turn filed T. S. No. 34 of 1924 in the Court of Subordinate Judge of Motihari against Rani Chhatra Kumari Devi and others claiming title to Ramnagar estate and for possession of the same on the basis of his adoption by Mohan Raja. The Title Suit and the Rent Suit were heard together by the Additional Sub-Judge, Motihari who by his judgment, dated 18th August, 1927 decreed the Title Suit filed by Rama Raja and dismissed the Rent Suit filed by Rani Chhatra Kumari Devi. There was an appeal to the High Court of Patna which dismissed the appeal. Against the judgment of the High Court appeals were taken to the Judicial Committee of the Privy Council. The appeal was decided in favour of Rani Chhatra Kumari Devi and the result was that the Title Suit filed by Rama Raja was dismissed and Rent Suit filed by Rani Chhatra Kumari Devi was decreed. In the course of judgment the Judicial Committee did not disturb the finding of the trial Court that Rama Raja was an adopted son of Shri Mohan Vikram Sah *alias* Mohan Raja and accepted that finding as correct, but the Judicial Committee held that Ramnagar estate was not the ancestral property of Mohan Raja, but he got that property by inheritance, he being the daughter's son of Prahlad Sen, the original proprietor of that estate. In view of this circumstance, the Judicial Committee held that though Rama Raja was the adopted son of Mohan Raja, Rama Raja was not entitled to the estate in view of the will executed by Mohan Raja in favour of Rani Chhatra Kumari Devi in the year 1904. It appears that in the year 1927 Rama Raja had taken possession of Ramnagar estate and got his name registered in Register D and remained in possession till the year 1931 when he lost the suit in Privy Council. After the decision of Privy Council Rani Chhatra Kumari Devi again came into possession of Ramnagar estate and continued to remain in possession till she died in 1937. It is in evidence that after the death of Rani Chhatra Kumari Devi, Rama Raja obtained possession of Ramnagar estate and continued to remain in possession thereof from 1937 till 1947, the year of his death. There is evidence that Rama Raja died in Bombay and his dead-body was cremated in Banaras.

It is also in evidence that during the lifetime of Rama Raja there was a partition suit in the year 1942—No. 40 of 1942—for the partition of the properties of the Ramnagar estate among Rama Raja and his sons including the respondent. This suit was filed on 29th September, 1942 in the Court of the Subordinate Judge at Motihari. A preliminary decree—Exhibit 1 (2)—was passed on 16th April, 1943 on compromise and the final decree—Exhibit 1 (1)—in the suit was passed on 22nd May, 1944. From the two decrees it appears that Ramnagar estate was comprised of extensive properties including zamindari interest in a large number of villages and the estate had an extensive area of Bakasht lands. By the said partition the estate was divided among the co-sharers but certain properties including forests in the estate were left joint.

On behalf of the appellant Mr Aggarwala put forward the argument that the High Court was not justified in holding that Naram Raja was born in Banaras in the year 1918. According to the case of the appellant Naram Raja was born at a place called Barewa in Nepal. In order to prove his case the appellant examined two witnesses—Sheonath Tewari (PW 18) and N D Pathak (PW 15). The High Court held that their evidence was not acceptable. There was also a plaint (Exhibit 8) produced on behalf of the appellant to show that Naram Raja was born at Barewa. This plaint was apparently filed in a suit brought by the respondent for the realisation of money advanced by the respondent's mother to one Babula Sah. The place of birth of the respondent is mentioned in this plaint as Barewa Durbar. The High Court did not attach importance to Exhibit 8 because it took the view that the description of the place of birth given in the document was only for the purpose of litigation. It further appears from Exhibit 8 that it was not signed by the respondent but by one Subbhan Mian Jolaha described as 'Agent'. On behalf of the respondent R.W 9—G S Prasad was examined to prove that Naram Raja was born at Banaras. The High Court accepted the evidence of this witness and also of the respondent himself on this point. It was submitted by Mr Aggarwala that there were two circumstances which indicate that the respondent could not have been born at Banaras. In the first place, it was pointed out the municipal registers of Banaras for the year 1918—Exhibit 2 series—did not mention the birth of the respondent. It was explained on behalf of the respondent that the house at Mamurganj in which the respondent was born was not included within the limits of the municipality in the year 1918, and that the omission of the birth of the respondent in the municipal registers was, therefore, of no significance. It was contended on behalf of the appellant that there was litigation with regard to properties of Ramnagar estate between the respondent's father and Rani Chhatra Kumari Devi and therefore the evidence of PW 9, G S Prasad that Rama Raja was living with Rani Chhatra Kumari Devi at Ramnagar even during her lifetime cannot be accepted as true. It was, therefore, suggested that it was highly improbable that Naram Raja should have been born at Banaras in the year 1918, as alleged, in the house belonging to Ramnagar estate. We do not however think it necessary to express any concluded opinion on this question of fact but proceed to decide the case on the assumption that Naram Raja was not born in the territory of India in the year 1918. The reason is that the place of birth of Naram Raja has lost its importance in this case in view of the concurrent findings of both the High Court and the Tribunal that for a period of 5 years preceding the commencement of the Constitution Naram Raja was ordinarily resident in the territory of India. Therefore the requirement of Article 5 (c) of the Constitution is fulfilled. Mr Aggarwala on behalf of the appellant did not challenge this finding of the High Court. It is, therefore, manifest that the requirement of Article 5 (c) of the Constitution has been established and the only question remaining for consideration is the question whether Naram Raja had his domicile in the territory of India at the material time.

Upon this question it was argued before the High Court on behalf of the respondent that the domicile of origin of Mohan Raja may have been in Nepal but he had acquired a domicile of choice in India after inheriting Ramnagar Raj from his maternal grandfather Prahlad Sen. It was said that Mohan Raja had settled down in India and had married all his 4 Rani in Ramnagar. It was argued, therefore, that at the time when Mohan Raja had adopted Rama Raja in 1903 Mohan Raja's domicile of choice was India. It was said that by adoption in 1903 Rama Raja became Mohan Raja's son and by fiction it must be taken that Rama Raja's domicile was India as if he was Mohan Raja's son. It was contended in the alternative that whatever may have been Rama Raja's domicile before 1937 when Rani Chhatra Kumari Devi died, Rama Raja acquired a domicile of choice in India when he came to India on the death of Rani Chhatra Kumari Devi. It was also stated on behalf of the respondent that Rama Raja remained in possession of the Ramnagar estate until his death in 1947. The High Court, however, held,

upon examination of the evidence that there was no material on the record to decide the question of Mohan Raja's domicile. It was also held by the High Court that it was not possible to ascertain from the evidence whether there was any intention of Rama Raja to settle down in India and make it his permanent home. In any event, Narain Raja was born in the year 1918 and unless the domicile of Rama Raja in 1918 was ascertained the domicile of origin of Narain Raja will remain unknown. The High Court, therefore, proceeded upon the assumption that Narain Raja had his domicile of origin in Nepal and examined the evidence to find out whether Narain Raja had deliberately chosen the domicile of choice in India in substitution for the domicile of origin.

The crucial question for determination in this case, therefore, is whether Narain Raja had acquired the domicile of choice in India.

The law on the topic is well established but the difficulty is found in its application to varying combination of circumstances in each case. The law attributes to every person at birth a domicile which is called a domicile of origin. This domicile may be changed, and a new domicile, which is called a domicile of choice, acquired; but the two kinds of domicile differ in one respect. The domicile of origin is received by operation of law at birth; the domicile of choice is acquired later by the actual removal of an individual to another country accompanied by his *animus manendi*. The domicile of origin is determined by the domicile, at the time of the child's birth, of that person upon whom he is legally dependent. A legitimate child born in a wedlock to a living father receives the domicile of the father at the time of the birth; a posthumous legitimate child receives that of the mother at that time. As regards change of domicile, any person not under disability may at any time change his existing domicile and acquire for himself a domicile of choice by the fact of residing in a country other than that of his domicile of origin with the intention of continuing to reside there indefinitely. For this purpose residence is a mere physical fact, and means no more than personal presence in a locality, regarded apart from any of the circumstances attending it. If this physical fact is accompanied by the required state of mind, neither its character nor its duration is in any way material. The state of mind, or *animus manendi*, which is required demands that the person whose domicile is the object of the inquiry should have formed a fixed and settled purpose of making his principal or sole permanent home in the country of residence, or, in effect, he should have formed a deliberate intention to settle there. It is also well established that the onus of proving that a domicile has been chosen in substitution for the domicile of origin lies upon those who assert that the domicile of origin has been lost. The domicile of origin continues unless a fixed and settled intention of abandoning the first domicile and acquiring another as the sole domicile is clearly shown (See *Winans v. Attorney-General*¹). In *Munro v. Munro*² Lord Cottenham states the rule as follows:

"The domicile of origin must prevail until the party has not only acquired another, but has manifested and carried into execution an intention of abandoning his former domicile, and acquiring another as his sole domicile. To effect this abandonment of the domicile of origin, and substitute another in its place, it required *animo et facto*, that is, the choice of a place, actual residence in the place then chosen, and that it should be the principal and permanent residence, the spot where he had placed *larem reumque ac fortunarum suarum summam*. In fact, there must be both residence and intention. Residence alone has no effect, *per se*, though it may be most important as a ground from which to infer intention."

In *Aikman v. Aikman*³, Lord Campbell has discussed the question of the effect on domicile of an intention to return to the native country, where such intention is attributable to an undefined and remote contingency. He said:

"If a man is settled in a foreign country, engaged in some permanent pursuit requiring his residence there, a mere intention to return to his native country on a doubtful contingency, will not prevent such a residence in a foreign country from putting an end to his domicile of origin. But a residence in a foreign country for pleasure, lawful or illicit, which residence may be changed at any moment, without the violation of any contract or any duty, and is accompanied by an intention of going back to reside in the place of birth, or the happening of an event which in the course of nature must speedily happen, cannot be considered as indicating the purpose to live and die abroad."

1. L. R. 1904 A.C. 287.

2. 7 Cl. & Fin. 876.

3. 3 Mac. Q. H.L.C., 854.

On behalf of the appellant Mr Aggarwala relied on the decision of the House of Lords in *Moorhouse v. Lord*¹ in which it was held that in order to lose a domicile of origin, and to acquire a new domicile a man must intend *quatenus in illo exuere patriam* and there must be a change of nationality, that is natural allegiance. It is not enough for him to take a house in the new country, even with the probability and the belief that he may remain there all the days of his life. But the principle laid down in this case was discussed in *Udny v. Udny*² which decision is the leading authority on what constitutes a domicile of choice taking the place of a domicile of origin. It is there pointed out by Lord Westbury that the expressions used in *Moorhouse v. Lord*,¹ as to the intent *exuere patriam*, are calculated to mislead, and go beyond the question of domicile. At page 458 Lord Westbury states.

Domicile of choice is a conclusion or inference which the law derives from the fact of a man fixing voluntarily his sole or chief residence in a particular place with the intention of continuing to reside there for an unlimited time. This is a description of the circumstances which create or constitute a domicile and not a definition of the term. There must be residence freely chosen and not prescribed or dictated by any external necessity such as the duties of office, the demands of creditors or the relief from illness, and it must be a residence fixed not for a limited period or particular purpose but general and indefinite in its future contemplation. It is true that residence originally temporary or intended for a limited period may afterwards become general and unlimited, and in such a case so soon as the change of purpose or *animus manendi* can be inferred the fact of domicile is established.

In the next case—*Doucet v. Geoghegan*³—the Court of Appeal decided that the testator had acquired an English domicile and one of the main facts relied on was that he had twice married in England in a manner not conforming to the formalities which are required by the French Law for the legalisation of marriages of Frenchmen in a foreign country. James, L.J. stated as follows.

Both his marriages were acts of unmitigated scoundrelism, if he was not a domiciled Englishman. He brought up his children in this country, he made his will in this country, professing to exercise testamentary rights which he would not have if he had not been an Englishman. Then with respect to his declarations, what do they amount to? He is reported to have said that when he had made his fortune he would go back to France. A man who says that is like a man who expects to reach the horizon and finds it at last no nearer than it was at the beginning of his journey. Nothing can be imagined more indefinite than such declarations. They cannot outweigh the facts of the testator's life.

In our opinion the decisions of the English Courts in *Udny v. Udny*² and *Doucet v. Geoghegan*³, represent the correct law with regard to change of domicile of origin. We are of the view that the only intention required for a proof of a change of domicile is an intention of permanent residence. In other words, what is required to be established is that the person who is alleged to have changed his domicile of origin has voluntarily fixed the habitation of himself and his family, in the new country not for a mere special or temporary purpose, but with a present intention of making it his permanent home.

Against this background of law we have to consider the facts in the present case for deciding whether Naram Raja had adopted India as his permanent residence with the intention of making a domicile of choice there. In other words, the test is whether Naram Raja had formed the fixed and settled purpose of making his home in India with the intention of establishing himself and his family in India.

The following facts have been either admitted by the parties or found to be established in this case. Naram Raja was educated in Calcutta from 1934 to 1938. From the year 1938 onwards Naram Raja lived in Ramnagar. After Rama Raja's death in 1947 Naram Raja continued to live in Ramnagar, being in possession of properties obtained by him under compromise in 1944. In the course of his statement Naram Raja deposed that his father had built a palace in Ramnagar between 1934 and 1941 and thereafter Naram Raja himself built a house at Ramnagar. Before he had built his house, Naram Raja lived in his father's palace. There is the partition suit between Naram Raja and his brothers in the year 1942. Exhibits 1 (2) and 1 (1) are the preliminary and final decrees granted in that suit. After the partition Naram Raja was looking after the properties which were left joint and

1 10 H.L. Cas 272

2 L.R. 1 H.L. Sc. 441

3 L.R. 9 Ch. Div 441

was the manager thereof. The extensive forest of Ramnagar estate were not partitioned and they had been left joint. Narain Raja used to make settlement of the forests on behalf of the Raj and pattas used to be executed by him. After partition, he and his wife acquired properties in the district of Champaran, in Patna and in other places. Narain Raja and his wife and children possessed 500 or 600 acres of land in the district of Champaran. Narain Raja managed these properties from Ramnagar. He had also his house in Bettiah, Chapra, Patna and Benares. The forest settlements are supported by Exhibits X series, commencing from 1943 and by Exhibit W of the year 1947. Then, there are registered pattas executed by Narain Raja of the year 1945, which are Exhibits W/3, W/4 and W/5. There are documents which prove acquisition of properties in the name of Narain Raja's wife—Exhibits F (1), F (2), F (3) and F (5). Exhibit F (4) shows the purchase of 11 bighas and odd land at Patna by Narain Raja. It is also important to notice that Narain Raja had obtained Indian Passport dated 23rd March, 1949 from Lucknow issued by the Governor-General of India and he is described in that Passport as Indian by birth and nationality and his address is given as Ramnagar of Champaran district. In the course of his evidence Narain Raja said that he had been to Bareilly for the first time with his father when he was 10 or 12 years old. He also said that he had not gone to Barwa for ten years before 1963.

The High Court considered that for the determination of the question of domicile of a person at a particular time the course of his conduct and the facts and circumstances before and after that time are relevant. We consider that the view taken by the High Court on this point is correct and for considering the domicile of Narain Raja on the date of coming into force of the Constitution of India his conduct and facts and circumstances subsequent to the time should also be taken into account. This view is borne out by the decision of the Chancery Court in *In re Grove: Vaucher v. The Solicitor to the Treasury*¹ in which the domicile of one Marc Thomegay in 1744 was at issue and various facts and circumstances after 1744 were considered to be relevant. At page 242 of the report Lopes, L.J. has stated :

"The domicile of an independent person is constituted by the factum of residence in a country and the *animus manendi*, that is, the intention to reside in that country for an indefinite period. During the argument it was contended that the conduct and acts of Marc Thomegay subsequently to February, 1744, at the time of the birth of Sarah were inadmissible as evidence of Marc Thomegay's intention to permanently reside in this country at that time. It was said that we must not regard such conduct and acts in determining what the state of Marc Thomegay's mind was in February, 1744. For myself I do not hesitate to say I was surprised at such a contention, it is opposed to all the rules of evidence, and all the authorities with which I am acquainted. I have always understood the law to be that in order to determine a person's intention at a given time, you may regard not only conduct and acts before and at the time, but also conduct and acts after the time, assigning to such conduct and acts their relative and proper weight of cogency. The law, I thought, was so well-established on that subject that I should not have thought it necessary to allude to this contention, unless I had understood that the propriety of admitting this evidence was somewhat questioned by Lord Justice Fry, a view which I rather now gather from his judgment he has relinquished."

We are, therefore, of opinion that the conduct and activities of Narain Raja subsequent to the year 1949 are relevant but we shall decide the question of his domicile in this case mainly in the light of his conduct and activities prior to the year 1949.

Reverting to the history of Narain Raja's life from 1950 onwards it appears that he had married his wife in 1950. His wife belonged to Darkoti in Himachal Pradesh near Patiala. The marriage had taken place at Banaras. Narain Raja had a son and a daughter by that marriage and according to his evidence the daughter was born in Banaras and the son was born in Bettiah. The daughter prosecutes her studies in Dehradun. In 1950 or 1951 Narain Raja had established a Sanskrit Vidyalaya in Ramnagar in the name of his mother called Prem Janani Sanskrit Vidyalaya. The story of Narain Raja's political activities is as follows : There was a Union Board in Ramnagar before Gram Panchayats had come into existence of which Narain Raja was the Chairman or President. After Gram

Panchayats were established the Union Board was abolished. Narain Raja was a voter in the Gram Panchayat and he was elected as the Vice President of the Union called C.D.C.M. Union of Ramnagar. For the General Elections held in 1952 Narain Raja was a voter from Ramnagar Constituency. In the General Election of 1957 he stood as a candidate opposing Kedar Pandey. Thereafter he became the President of the Bettiah Sub divisional Swatantra Party and then Vice President of Champaran District Swatantra Party.

Taking all the events and circumstances of Narain Raja's life into account we are satisfied that long before the end of 1949 which is the material time under Article 5 of the Constitution, Narain Raja had acquired a domicile of choice in India. In other words, Narain Raja had formed the deliberate intention of making India his home with the intention of permanently establishing himself and his family in India. In our opinion, the requisite *animus manendi* has been proved and the finding of the High Court is correct.

On behalf of the appellant Mr. Aggarwala suggested that there were two reasons to show that Narain Raja had no intention of making his domicile of choice in India. Reference was made in this context to Exhibit 10 (c) which is a khatian prepared in 1960 showing certain properties standing in the name of Narain Raja and his brothers in Nepal. It was argued that Narain Raja had property in Nepal and so he could not have any intention of living in India permanently. It is said by the respondent that the total area of land mentioned in the khatian was about 43 bighas. The case of Narain Raja is that the property had belonged to his natural grandmother named Kanchhi Maya who had gifted the land to Rama Raja. The land was the exclusive property of Rama Raja and after his death the property devolved upon his sons. The case of Narain Raja on this point is proved by a Sanad (Exhibit AA). In any event, we are not satisfied that the circumstance of Narain Raja owning the property covered by Exhibit 10 (c) can outweigh the fact that Narain Raja alone had extensive properties in India after the partition decree of the year 1944.

It was also pointed out on behalf of the appellant that Narain Raja, and before him Rama Raja had insisted upon designating themselves 'Sri 5' indicating that they belonged to the Royal family of Nepal. It was argued on behalf of the appellant that Narain Raja had clung tenaciously to the title of 'Sri 5,' thereby indicating the intention of not relinquishing the claim to the throne of Nepal if at any future date succession to the throne falls to a junior member of the family of the King of Nepal. We do not think there is any substance in this argument. It is likely that Narain Raja and his father Rama Raja had prefixed the title of 'Sri 5' to their names owing to the pride of their ancestry and sentimental attachment to the traditional title and this circumstance has no bearing on the question of domicile. Succession to throne of Nepal is governed by the rule of primogeniture and it cannot be believed that as the second son of his father, Narain Raja could ever hope to ascend to the throne of Nepal and we think it is unreasonable to suggest that he described himself as 'Sri 5' with the intention of keeping alive his ties with Nepal. There was evidence in this case that Narain Raja's elder brother Shiv Bikram Sah has left male issues.

For the reasons expressed we hold that Narain Raja had acquired domicile of choice in India when Article 5 of the Constitution came into force. We have already referred to the finding of the High Court that Narain Raja was ordinarily resident in India for 5 years immediately preceding the time when Article 5 of the Constitution came into force. It is manifest that the requirements of Article 5 (c) of the Constitution are satisfied in this case and the High Court rightly reached the conclusion that Narain Raja was a citizen of India at the relevant time.

We accordingly dismiss both these appeals with costs one set.

—V. K.—

Appeals dismissed

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—A. K. SARKAR, J. R. MUDHOLKAR AND R. S. BACHAWAT, JJ.

Radha Rani Bhargava

.. Appellant*

v.

Hanuman Prasad Bhargava (deceased) and after him by his legal representatives and others

.. Respondents.

Hindu Succession Act (XXX of 1956), sections 14, 15 and 16—Alienation by Hindu female before Hindu Succession Act came into force—Suit for declaration that alienation is not binding on reversioners—Maintainability after the coming into force of the Hindu Succession Act.

Constitution of India (1950), Article 133—Appeal to Supreme Court—Person dead at the time of filing of petition of appeal impleaded as one of the respondents—Petition of appeal if a nullity.

Civil Procedure Code (V of 1908), Order 22, rule 9—Suit by reversioner in a representative capacity for declaration that alienation made by a Hindu widow is void beyond her lifetime—Widow added as defendant along with the alienees—Death of widow pending suit or pending appeal in suit—Legal representatives of widow necessary parties.

Section 14 of the Hindu Succession Act (XXX of 1956), does not apply to properties in the possession of alienees under an alienation made by a Hindu female limited owner before the Hindu Succession Act came into force, and in respect of such properties sections 14, 15 and 16 do not abolish the reversioners and reversionary rights. Hence it is open to a reversioner to maintain a suit for a declaration that an alienation made by a Hindu female limited owner before the coming into force of the Hindu Succession Act was without legal necessity and is not binding on the reversioners even after the coming into force of the Hindu Succession Act.

Where in an appeal to the Supreme Court a person who died before the filing of the petition of appeal is impleaded among others as a party respondent, the petition of appeal would not be a nullity. The appeal may proceed against the other respondents on the footing that the dead person was not a party to the appeal.

In the case of an alienation by a Hindu widow without legal necessity, the reversioners are not bound to institute a declaratory suit for a declaration that the alienation is not binding on them during the lifetime of the widow. They could wait until her death and then sue the alienee for possession of the alienated property treating the alienation as a nullity without the intervention of any Court. To such a suit by the reversioners for possession of the property after the death of the widow, the heirs of the widow are not necessary parties. The reversioners could claim no relief against the heirs of the widow and could effectively obtain the relief claimed against the alienee in their absence. Instead of waiting until her death, the next reversioner as representing all the reversioners of the last full owner could institute a suit against the alienee for a declaration that the alienation was without legal necessity and was void beyond her lifetime. The widow is usually added as a party defendant to such a suit. The widow is certainly a proper party; and whether or not she is a necessary party to the suit there can be no doubt that in the case of the death of the widow during the pendency of the declaratory suit, the heirs of the widow are not necessary parties to the suit. Though the widow is joined as a party to the suit, no relief is claimed against her personally. On the death of the widow, the entire estate of the last full owner is represented by the plaintiff suing in a representative capacity on behalf of all the reversioners, and the plaintiff can get effective relief against the alienee in the absence of the heirs of the widow. In view of the fact that on the death of the widow, the reversioners become entitled to possession of the property, in a proper case leave may be obtained to amend the plaint in the declaratory suit by adding all the reversioners as plaintiffs and by including in the plaint a prayer for possession of the property. If the plaint is amended and the suit is converted into one for possession of the property, clearly the heirs of the widow would not be necessary parties to the suit. The fact that the plaint is not amended makes no difference. The plaintiff is entitled to continue the declaratory suit without joining the heirs of the widow as parties to the suit.

As the reversioners were not entitled to the possession of the property at the time of the institution of the suits, the next reversioner could then sue for a bare declaration and the proviso to section 42 of the Specific Relief Act, 1877 would not constitute a bar to the suit. The declaratory suit does not become defective because during the pendency of the suit, the reversioners become entitled to further

relief. The next reversioner is entitled to continue the declaratory suit, but in the absence of an amendment of the plaint, a decree for possession of the property cannot be passed in the suit and if the reversioners are to get any real benefit they must institute a suit for possession of the property within the period of limitation.

The position would not be altered where the suit for a declaration that an alienation made by a Hindu widow was void beyond the lifetime of the widow is dismissed by the High Court on appeal from a decree of the trial Court and during the pendency of an appeal to the Supreme Court from the decision of the High Court the widow dies and the appeal against her abates. In such a case failure to implead the heirs of the widow would not render the appeal defective.

Appeal from the Judgment and Decree dated 25th September, 1957 of the Allahabad High Court in First Appeal No. 232 of 1942.

Naumt Lal, Advocate, for Appellant

S T Desai, Senior Advocate (*Rameshwar Nath* and *S N Ardley*, Advocates of *M/s Rajinder Narain & Co.*, with him), for Respondents Nos. 1 and 3.

M V Goswami, Advocate, for Respondents Nos. 2 and 4.

S Murthy and *B P Maheshwari*, Advocates for Respondent No. 5.

The Judgment of the Court was delivered by

Bachawat, J.—One Kalyan Singh died sonless in the year 1918 leaving him surviving his widow, Mst Bhagwati and two daughters, Mst Indrawati and Mst Radha Rani. By a deed dated 10th October, 1919 Mst Bhagwati alienated her husband's estate in favour of certain alienees. On 23rd October, 1931, Mst Indrawati suing in a representative capacity on behalf of the reversioners to the estate of Kalyan Singh, instituted the suit in the Court of the Additional Civil Judge of Mathura, out of which this appeal arises, impleading the alienees as also Mst Bhagwati and Mst Radha Rani as defendants and claiming a declaration that the alienation was null and void against the subsequent heirs of Kalyan Singh and that on the death of Mst Bhagwati, his next heirs would be entitled to get possession of the alienated properties. On 12th August, 1941, the trial Judge decreed the suit and granted a declaration that the alienation "is void beyond the lifetime of Mst Bhagwati and does not bind the reversioners, who would be entitled after the death of Mst Bhagwati to possession over the assets of Babu Kalyan Singh." On 12th February, 1942, some of the alienees preferred an appeal to the Allahabad High Court impleading Mst Bhagwati, Mst Indrawati and Mst Radha Rani, as respondents to the appeal. Three sons of Mst Indrawati and two sons of Mst Radha Rani were also impleaded as respondents Nos. 8 to 12, but by an order dated 11th March, 1942, the High Court directed that those persons would not be allowed to be impleaded as respondents. During the pendency of the appeal in the High Court, Mst Indrawati died. By an order dated 11th May, 1950, the High Court directed that Mst Radha Rani would continue to be on the record in place of her deceased sister, Mst Indrawati and as the next reversioner to the estate of Kalyan Singh. During the pendency of the appeal, on 17th June, 1956 Hindu Succession Act, 1956 came into force. At the hearing of the appeal before the High Court, the alienees raised the preliminary contention that after the coming into force of the Hindu Succession Act, 1956, there are no reversioners and no reversionary rights, and a suit for a declaration that the alienation is not binding on the reversioners is no longer maintainable. The High Court accepted this contention, allowed the appeal and dismissed the suit. The High Court did not go into the other questions raised in the appeal. On 2nd January, 1958, Mst. Radha Rani applied to the High Court for grant of a certificate under Article 133 of the Constitution of India. On 8th August, 1958, the High Court granted the certificate, and on 27th February, 1959, the High Court declared the appeal admitted. On 29th May, 1961, Mst Bhagwati died. On or about 13th November, 1961, the High Court despatched the records to this Court. No order of the High Court under Order 16, Rule 12 (a) of the Supreme Court Rules substituting the heirs

of Mst. Bhagwati in her place was obtained, and the appeal abated against her. On 26th March, 1962, Mst. Radha Rani filed the petition of appeal in this Court. In this petition of appeal, Mst. Bhagwati and also the above-mentioned three sons of Mst. Indrawati and two sons of Mst. Radha Rani were impleaded as respondents. On 24th August, 1964, respondents Nos. 1 to 3 filed Civil Miscellaneous Petition No. 2219 of 1964 raising certain preliminary objections and praying that the appeal be dismissed. This petition was posted for hearing along with the appeal.

On the merits, the respondents have very little to say. The High Court took the view that the effect of sections 14, 15 and 16 of the Hindu Succession Act, 1956 was that after the coming into force of the Act, there are no reversioners and no reversionary rights. The Patna High Court in some of its earlier decisions took the same view, but other High Courts took the view that section 14 did not apply to properties in the possession of alienees under an alienation made by the Hindu female before the Act came into force, and in respect of such properties, sections 14, 15 and 16 of the Act did not abolish the reversioners and reversionary rights. In *Gummalapura Taggina Matada Kotturuswami v. Setra Veerayya and others*¹ this Court approved of the latter view, and this opinion was followed by this Court in *Brahmadeo Singh and another v. Deomani Missir and others*². In the last case, the trial Court had decreed a suit by the reversioners for a declaration that two sale deeds executed by a Hindu widow were without legal necessity and not binding upon them. The Patna High Court allowed an appeal by the alienees and dismissed the suit holding that by reason of the provisions of section 14 of the Hindu Succession Act, a suit by a reversioner for a declaration that an alienation made by a Hindu female is not binding on the reversioner is not maintainable. From the decision of the Patna High Court the reversioners preferred an appeal to this Court. This Court held that the view taken by the Patna High Court following its earlier decision in *Ramsaroop Singh and others v. Hiralall Singh and others*³, and of the Allahabad High Court in *Hanuman Prasad v. Indrawati*⁴, (the decision under appeal in this case) was incorrect, and section 14 of the Hindu Succession Act, 1956 did not extend to property already alienated by a Hindu female. This Court accordingly allowed the appeal, and reversed the decree of the Patna High Court. The effect of this decision is that it is open to a reversioner to maintain a suit for a declaration that an alienation made by a Hindu female limited owner before the coming into force of the Hindu Succession Act, 1956 was without legal necessity and was not binding upon the reversioners. It follows that the High Court was in error in holding that the present suit was not maintainable since the coming into force of the Hindu Succession Act, 1956.

But the contesting respondents raised certain preliminary objections, and they contend that the appeal should be dismissed.

The first preliminary objection is that the three sons of Mst. Indrawati and the two sons Mst. Radha Rani are improperly joined as respondents Nos. 8 to 12 in the petition of appeal. Respondents Nos. 8 to 12 were not parties to the appeal before the High Court nor was any order obtained permitting their joinder in the appeal to this Court. The contesting respondents therefore pray that the names of respondents Nos. 8 to 12 be struck off from the record. The appellant does not object to this prayer. We direct accordingly that the names of respondents Nos. 8 to 12 be struck off from the record.

The next preliminary objection is that the petition of appeal is a nullity as Mst. Bhagwati, a dead person was impleaded as a party respondent therein. As Mst. Bhagwati was dead on the date of the filing of the petition of appeal, she could not be shown as a respondent in this appeal. But the appeal may proceed against the other respondents on the footing that Mst. Bhagwati is not a party to the appeal.

The next preliminary objection is that the appeal is defectively constituted and is not maintainable in the absence of the heirs of Mst. Bhagwati. The heirs of

1. (1959) 1 S.C.R. Supp. 968 at 975-976; 15th October, 1962.
 (1959) S.C.J. 437 : (1959) 1 M.L.J. (S.C.) 158 : 3. A.I.R. 1958 Patna 319.
 (1959) 1 An. W.R. (S.C.) 158. 4. A.I.R. 1958 All. 304.

2. Civil Appeal No. 130 of 1960 decided on

Mst Bhagwati are Mst Radha Ram and the sons and daughters of Mst Indrawati. The appellant did not obtain any order of Court substituting the heirs of Mst Bhagwati in her place. Besides the three sons of Mst Indrawati who are shown as respondents Nos 10, 11 and 12 in the petition of appeal, Mst Indrawati left another son, Lallu also known as Ram Prasad and two daughters Ram Dulari and Vimla Lallu, Ram Dulari and Vimla are not parties to the appeal. Respondents Nos 10, 11 and 12 were improperly added as parties in the petition of appeal and their names must be struck off. The result is that none of the sons and daughters of Mst Indrawati are parties to the appeal. It follows that all the heirs of Mst Bhagwati are not parties to the appeal and the question is whether the appeal is defectively constituted in their absence.

In this connection, it is necessary to consider whether the heirs of the widow were necessary parties to a suit against the alienee either for a declaration that the alienation is void beyond her lifetime or for possession of the alienated property. In the case of an alienation by a Hindu widow without legal necessity, the reversioners were not bound to institute a declaratory suit during the lifetime of the widow. They could wait until her death and then sue the alienee for possession of the alienated property treating the alienation as a nullity without the intervention of any Court. See *Byaj Gopal Mukherji v Krishna Mahesh Deb*.¹ To such a suit by the reversioners for possession of the property after the death of the widow, the heirs of the widow were not necessary parties. The reversioners could claim no relief against the heirs of the widow and could effectively obtain the relief claimed against the alienee in their absence. Instead of waiting until her death the next reversioner as representing all the reversioners of the last full owner could institute a suit against the alienee for a declaration that the alienation was without legal necessity and was void beyond her lifetime. The widow was usually added as a party defendant to such a suit. The widow was certainly a proper party, but was she a necessary party to such a suit? On behalf of the appellant it is suggested that the widow is not a necessary party to the suit, and in this connection reference is made to Illustration (c) to section 42 of the Specific Relief Act, 1877. For the purposes of this appeal, it is not necessary to decide this broad question, it is sufficient to say that in the case of the death of the widow during the pendency of the declaratory suit, the heirs of the widow are not necessary parties to the suit. Though the widow was joined as a party to the suit, no relief was claimed against her personally. On the death of the widow, the entire estate of the last full owner is represented by the plaintiff suing in a representative capacity on behalf of all the reversioners, and the plaintiff can get effective relief against the alienee in the absence of the heirs of the widow. In view of the fact that on the death of the widow, the reversioners become entitled to possession of the property, in a proper case leave may be obtained to amend the plaint in the declaratory suit by adding all the reversioners as plaintiffs and by including in the plaint a prayer for possession of the property. If the plaint were amended and the suit were converted into one for possession of the property, clearly the heirs of the widow would not be necessary parties to the suit. The fact that the plaint is not amended makes no difference. The plaintiff is entitled to continue the declaratory suit without joining the heirs of the widow as parties to the suit.

As the reversioners were not entitled to the possession of the property at the time of the institution of the suit, the next reversioner could then sue for a bare declaration and the proviso to section 42 of the Specific Relief Act, 1877 did not constitute a bar to the suit. The declaratory suit does not become defective because during the pendency of the suit, the reversioners become entitled to further relief. The next reversioner is entitled to continue the declaratory suit, but in the absence of an amendment of the plaint, a decree for possession of the property cannot be passed in the suit, and if the reversioners are to get any real benefit, they must institute a suit for possession of the property within the period of limitation.

Had Mst. Bhagwati died during the pendency of the suit, her heirs would not have been necessary parties to the suit. The position is not altered because the suit has been dismissed on appeal by a decree of the High Court, and during the pendency of the further appeal to the Court, Mst. Bhagwati died, and the appeal against her has abated. The appeal against the surviving respondents has not abated, and we think that the appeal is not defectively constituted in the absence of the heirs of Mst. Bhagwati. In the appeal to this Court, Mst. Radha Rani asks for the identical relief which the original plaintiff sought in the suit. She can get effective relief in the appeal in the absence of the heirs of Mst. Bhagwati just as the original plaintiff could obtain the relief in the suit in their absence. The fact that the suit was dismissed by the High Court in the presence of Mst. Bhagwati makes no difference. In the suit, the plaintiff asked for the necessary relief against the alienees; Mst. Bhagwati was joined as a party to the suit, but no relief was claimed against her personally. The High Court dismissed the suit against the alienees. The appellant to this Court now seeks for reversal of the High Court decree in the presence of the alienees. The reversal of the High Court decree in the absence of the heirs of Mst. Bhagwati would not lead to the passing of inconsistent and contradictory decrees. The High Court did not pass any decree in favour of Mst. Bhagwati. The success of this appeal cannot lead to the passing of a decree by this Court in conflict with any decree passed by the High Court in favour of Mst. Bhagwati. The cause of appeal in this Court survives against the surviving respondents, and the appeal can proceed to a final adjudication in the absence of the heirs of Mst. Bhagwati.

We hold that the appeal is not defective on account of the non-joinder of necessary parties. Civil Miscellaneous Petition No. 2219 of 1964 is dismissed, save that we direct that the names of respondents Nos. 8 to 12 be struck off from the record.

In the result, the appeal is allowed, the judgment and decree dated 25th September, 1957 of the High Court are set aside, and First Appeal No. 232 of 1942 must now be heard on the merits by the High Court. The contesting respondents must pay to the appellants the costs in this Court.

V.K.

Appeal allowed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—P. B. GAJENDRAGADKAR, *Chief Justice*, K. N. WANCHOO, J. C. SHAH, RAGHUBAR DAYAL, S. M. SIKRI, R. S. BACHAWAT AND V. RAMASWAMI, JJ.

M/s. Kamala Mills Ltd.

.. Appellant*

v.

The State of Bombay

.. Respondent.

M/s. K.S. Venkataraman & Co., Private Ltd., and others

.. Interveners.

Bombay Sales Tax Act (V of 1946) as amended by Bombay Ordinance (II of 1952), section 20—Scope and applicability—“Assessment made under this Act”—If includes erroneous orders of assessments—Assessment based on erroneous finding as to the nature or character of the transaction—If protected by section 20—Suit for refund of tax alleged to have been illegally levied and collected on outside sales due to mistake of fact and law—If barred by section 20—Suit challenging the validity of section 20 itself—If barred.

Civil Procedure Code (V of 1908), section 9—Scope.

Constitution of India (1950), Articles 19 (1) (f) and 32—Section 20 of the Bombay Sales Tax Act (V of 1946) if constitutionally valid.

The assessee, a limited company owning a textile mill in Bombay and carrying on the business of manufacture and sale of textile cloth, sold goods during the period 26th January, 1950 to 31st March, 1951, inside and outside the then State of Bombay on which sales tax was levied. The total sales tax thus levied in respect of the outside sales was Rs. 65,187-4-0. On 20th December, 1956, the assessee filed a suit on the original side of the Bombay High Court claiming a refund of the tax paid by it in respect of the outside sales on the ground that it had been illegally levied, as outsid-

sales are exempt from taxation under Article 286 of the Constitution of India. According to the assessee, the illegality of the impugned assessment, levy, imposition and collection was discovered by it soon after the Supreme Court pronounced judgment in *The Bengal Immunity Co Ltd v The State of Bihar and others*¹ (1955) 2 S C R. 603. The ground on which the said relief was claimed was that at the time when the tax was recovered, the assessee was under a mistake of fact and law. According to the assessee even the State might have been labouring under the same mistake of fact and law because the true constitutional and legal position in regard to the jurisdiction and authority of different States to recover sales tax in respect of outside sales was not correctly appreciated until the decision in *The Bengal Immunity case*, (1955) 2 S C R. 603, was pronounced. On the question whether the suit was barred by section 20 of the Bombay Sales Tax Act (V of 1946) and if so whether the section was constitutionally valid

Held, the suit was barred by section 20 of the Bombay Sales Tax Act (V of 1946) and the said section was constitutionally valid

Section 20 of the Bombay Sales Tax Act (V of 1946) protects "assessment made under the Act or the rules made thereunder" by the appropriate authorities. There can be little doubt that the clause "an assessment made" cannot mean an assessment properly or correctly made. The said clause takes in all assessments made or purported to have been made under the Act. The words used in the section are so wide that even erroneous orders of assessments made would be entitled to claim its protection against the institution of a civil suit. Thus an order of assessment, though erroneous, and though based on an incorrect finding of fact, is nevertheless an order of assessment made under the Act within the meaning of section 20 and section 20 in terms provides that it will not be called in question in any civil Court.

It is true that as Halbhury has observed the jurisdiction of an inferior tribunal may depend upon the fulfilment of some condition precedent or upon the existence of some particular fact. Such a fact is collateral to the actual matter which the inferior tribunal has to try and the determination whether it exists or not is logically and temporally prior to the determination of the actual question which the inferior tribunal has to try. The inferior tribunal must itself decide as to the collateral fact, but it cannot by wrong decision with regard to the collateral fact, give itself a jurisdiction which it would not otherwise possess.

But it cannot be argued that a transaction which is exempted from taxation either by virtue of Article 286 of the Constitution of India or by virtue of any specific statutory provision cannot be validly assessed and an assessment made in respect of it would be without jurisdiction and so cannot claim the status of an "assessment made under the Act" within the meaning of section 20 and consequently a suit challenging such an invalid assessment would be competent. Such an argument proceeds on the assumption that the decision about the character of the transaction is a decision of a collateral fact, the finding on which alone confers jurisdiction on the tribunal to levy the tax. This assumption is not well founded. It is impossible to accept the argument that the finding of the appropriate authority that a particular transaction is taxable is a finding on a collateral fact which gives the appropriate authority jurisdiction to take a further step and make the actual order of assessment. The whole activity of assessment beginning with the filing of the return and ending with an order of assessment falls within the jurisdiction of the appropriate authority and no part of it can be said to constitute a collateral activity not specifically and expressly included in the jurisdiction of the appropriate authority as such. So it cannot be argued that the finding that a particular transaction is taxable is a finding on a collateral fact and it is only if the said finding is correct that the appropriate authority can validly exercise its jurisdiction to levy sales tax in respect of the transaction in question. In fact this position would be equally true about the appropriate authority functioning either under similar Sales Tax Acts (similar to the Bombay Sales Tax Act (V of 1946)) or under the Income-tax Act. Hence it cannot be held that an assessment based on an erroneous finding about the character of the transaction is an assessment made without jurisdiction and as such is outside the purview of section 20 of the Bombay Sales Tax Act (V of 1946).

There is no doubt that a claim for the refund of sales tax alleged to have been paid through mistake is a claim of a civil nature and normally it should be triable by the ordinary Courts of competent jurisdiction as provided by section 9 of the Code of Civil Procedure (V of 1908) but this section itself lays down that the jurisdiction of the civil Courts to try suits of a civil nature can be excluded either expressly or impliedly.

In every case the question about the exclusion of the jurisdiction of civil Courts either expressly or by necessary implication must be considered in the light of the words used in the statutory provision on which the plea is rested, the scheme of the relevant provisions, their object and their purpose.

Whenever it is urged before a civil Court that its jurisdiction is excluded either expressly or by necessary implication to entertain claims of a civil nature, the Court naturally feels inclined to consider whether the remedy afforded by an alternative provision prescribed by a special statute is sufficient or adequate. In cases where the exclusion of the civil Courts' jurisdiction is expressly provided for, the consideration as to the scheme of the statute in question and the adequacy or the sufficiency of the remedies provided for by it may be relevant but cannot be decisive. But where exclusion is pleaded as a matter of necessary implication such considerations would be very important, and in conceivable circumstances, might even become decisive.

Section 13 of the Bombay Sales Tax Act (V of 1946) expressly provides for refund of tax paid in excess of the amount due and the proviso to this section prescribes a period of limitation of 24 months for claiming such refund. Section 21 provides for the remedy of an appeal and section 22 provides for a revisional remedy. It is significant that though section 21 (1) prescribes a period of sixty days for appeal and section 22 prescribes a period of four months for revision, under section 22-B the prescribed authority is given power to extend the period of limitation. Section 23-A provides for rectification of mistake. It is thus clear that the assessee in the instant case could have either appealed or applied for revision and prayed for condonation of delay on the ground that the mistake which was responsible for the recovery of the tax illegally levied was discovered on the 6th September, 1955, because such a plea would have been perfectly competent under section 22-B. Therefore it cannot be said that the assessee had no alternative remedy under the Bombay Sales Tax Act (V of 1946). This conclusion serves a double purpose. It makes it easier to construe the wide words used in section 20 and hold that they constitute an absolute bar against the institution of the present suit and it also helps to repel the plea that section 20 if it is so widely construed is unconstitutional.

Though the suit of the assessee may be incompetent in so far as the assessee seeks for a decree for refund, its suit cannot be said to be incompetent in so far as it seeks to challenge the validity of section 20 itself. The bar created by section 20 cannot obviously be pleaded where the validity of section 20 itself is challenged.

Appeal from the Judgment and Order dated 7th August, 1961, of the Bombay High Court in Appeal No. 51 of 1960.

A. V. Viswanatha Sastri, Senior Advocate, (*I. N. Shroff*, Advocate with him), for Appellant.

S. V. Gupte, Solicitor-General of India and *S. G. Patwardhan*, Senior Advocate, (*R. H. Dhebar*, Advocate, with them), for Respondent.

S. Venkatakrishnan, Advocate for Intervener No. 1.

Naunit Lal, Advocate, for Intervener No. 2.

P. Govinda Menon and *Dr. V. A. Seyid Muhammed*, Advocates, for Intervener No. 3.

R. Ganapathy Iyer and *B. R. G. K. Achar*, Advocates, for Intervener No. 4.

N. Krishnaswamy Reddy, Advocate-General for the State of Madras, (*V. Ramaswami*, Additional Government Pleader and *A. V. Rangam*, Advocate, with him) for Intervener No. 5.

M. S. Gupta, Advocate, for Intervener No. 6.

G. C. Kashiwal, Advocate-General for the State of Rajasthan, (*K. K. Jain* and *R. N. Sachthay*, Advocates, with him), for Intervener No. 7.

C. B. Agarwala, Senior Advocate, (*O. P. Rana*, Advocate, with him), for Intervener No. 8.

B. Sen, Senior Advocate, (*S. C. Bose*, Advocate and *P. K. Chakravarti*, Advocate for *P. K. Bose*, Advocate with him), for Intervener No. 9.

B. V. Subramaniam, Advocate-General for the State of Andhra Pradesh, (*B. R. G. K. Achar*, Advocate, with him), for Intervener No. 10.

The Judgment of the Court was delivered by

Gajendragadkar, C. J.—The principal point of law which arises in this appeal is whether the Bombay High Court was right in holding that the suit filed by the

appellant, Kamala Mills Ltd, against the respondent, the State of Bombay, was incompetent. The appellant is a Limited Company and owns a textile mill at Bombay. It carries on business of manufacture and sale of textile cloth. During the period 25th January, 1960 to 31st March, 1951, the appellant was registered as a 'Dealer' under the provisions of the Bombay Sales Tax Act, 1946 (V of 1946) (hereinafter called the Act). The appellant's case is that during the said period, it sold goods inside and outside the then State of Bombay. The total value of goods sold by the appellant outside the State of Bombay was Rs 40 20 623 12-0 and Rs 1,08 946 14 0. On the said sales of Rs 40,20 623 12 0 General Sales Tax of Rs 61 885 12 0 was levied, whereas on the sales of Rs 1 08,946-14-0 Special Sales Tax of Rs 3 301 8 0 was levied. The total Sales Tax thus levied against the appellant in respect of the outside sales during the relevant period was Rs 65,187-4 0.

On 20th December, 1956, the appellant instituted the present suit (No 402 of 1956) on the Original Side of the Bombay High Court and claimed to recover the said amount from the respondent on the ground that it had been illegally levied against it. According to the appellant the illegality of the impugned assessment levy, imposition and collection was discovered by it soon after this Court pronounced its judgment in *the Bengal Immunity Co Ltd v The State of Bihar and others*¹, on the 6th September, 1955. The appellant's case further was that section 20 of the Act did not bar the institution of the present suit and, in the alternative, if it was held that it created a bar, the said section was *ultra vires* the Constitution of India and void.

The claim thus made by the appellant was resisted by the respondent on several grounds. One of the pleas raised by the respondent was that the Court had no jurisdiction to entertain the suit. It was urged by the respondent that section 20 of the Act created a bar against the institution of the present suit, and the suit should, therefore, be dismissed on that preliminary ground. The respondent also contended that the plea raised by the appellant that the said section was *ultra vires* the Constitution was without any substance. On the merits the respondent pleaded that the appellant was not justified in claiming a refund of the amount of tax recovered from it for the sale transactions in question.

On these pleadings the learned trial Judge framed nine issues. Issue No 2 was in regard to the jurisdiction of the Court to entertain the suit. This issue was tried by the learned trial Judge as a preliminary issue. He held that section 20 of the Act was a bar to the institution of the present suit, and on that view, he upheld the plea raised by the respondent. In the result the appellant's suit was dismissed.

The appellant challenged the correctness of the said decision by preferring an appeal before a Division Bench of the said High Court under Clause 15 of the Letters Patent. The Division Bench agreed with the view taken by the learned trial Judge and dismissed the appeal preferred by the appellant. The appellant then applied for and obtained a certificate from the said High Court and it is with the said certificate that it has come to this Court in appeal.

When this appeal was argued before a Division Bench of this Court on 23rd March, 1964, Mr Purshottam for the appellant contended that in addition to the point which had been decided by the High Court he wanted to urge that section 20 of the Act was invalid. The case which was thus presented by Mr Purshottam was that on a fair and reasonable construction it should be held that section 20 does not create a bar against the institution of the present suit. If, however, it was construed to create a bar, it was Constitutionally invalid. It appears that though this alternative plea had been taken by the appellant in its plaint, no issue was framed in respect of it and naturally the point has not been considered either by the learned trial Judge or by the Division Bench which heard the Letters Patent Appeal. Even so, the Division Bench of this Court which heard the appeal, allowed

Mr. Purshottam to raise this alternative contention, and so, the appeal was ordered to be placed before a Constitution Bench.

The appeal then came on for hearing before the Constitution Bench on 10th April, 1964. After it was argued for some time, the Court decided to issue notices to the Advocates-General of different States, because it was felt that the question about the constitutionality of section 20 of the Act which the appellant wanted to raise was of considerable importance and different States may be interested in presenting their case before this Court, for a provision similar to that of the impugned section would be found in Sales Tax Statutes passed by many State Legislatures. That is why this Court directed that notices should be served on the Advocates-General of all States and the matter should be placed for hearing before a Special Bench. That is how this matter has been placed before a Special Bench for final disposal.

For the appellant, Mr. Viswanatha Sastri has urged two points before us. He argues that on a fair construction of section 20, it should be held that the present suit is outside the mischief of the said section. In the alternative, he contends that if section 20 creates a statutory bar against the institution of a suit like the present, it should be held *ultra vires* the Constitution.

Before dealing with the points raised in this appeal, it would be necessary to refer to one fact which is not in dispute. The Act was passed in 1946 and it came into force on 8th March, 1946. At that time, the word "sale" as defined by section 2 (g) of the Act would have taken in all sales whether they were inside sales or outside sales. After the Constitution was adopted on 26th January, 1950. Article 286 came into force and it protected certain sales specified by it from the purview of the Act taxation. It may theoretically be true that as soon as Article 286 became effective, the expression "sale" as defined by the Act was automatically Constitutionally controlled by the limitations prescribed by it. To make this position clear, however Bombay Ordinance II of 1952 was passed and by section 3, it added section 30 to the Act. In effect, section 30 introduced in the Act the relevant provisions prescribed by Article 286 of the Constitution, so as to bring the operation of the Act expressly in conformity with the said Constitutional provision. Section 3 further made it clear that the addition made by it by introducing section 30 in the Act shall be made and shall always be deemed to have been made in the said Act as so continued in force, with effect from the 26th January, 1950.

It is well-known that the controversy in regard to the interpretation of Article 286 began with the decision of this Court in *the State of Bombay v. United Motors*¹, and ended with the subsequent decision of this Court in the case of *Bengal Immunity Company*². In order to alleviate the economic crisis which was likely to result in view of the subsequent decision of this Court, the President promulgated the Sales Tax Validation Ordinance, 1956 on 30th January, 1956, the provisions of which were later incorporated in the Sales Tax Validation Act, 1956. This Act validated sales tax collected by different States from 1st April, 1951 to 6th September, 1955 in accordance with the principles laid down by this Court in *United Motor's case*¹. The sales tax similarly collected between 26th January, 1950 to 31st March, 1951 was also sought to be validated by the Sales Tax Continuance Order, 1950. If we had reached the stage of considering the merits about the validity of the recovery of tax in the present case, it would have become necessary for us to consider the effect of this Continuance Order. Mr. Sastri contends that notwithstanding the Continuance Order, the recovery of the tax is illegal and that is the main foundation of his argument before us. The present dispute between the parties according to Mr. Sastri, is thus essentially similar to other disputes between assesseees and the respective States where through mistake, tax was collected or paid in regard to transactions which were really outside sales and were strictly not liable to be taxed.

1. (1953) S.G.J. 373 : (1953) 1 M.L.J. 743 :
(1953) S.C.R. 1069.

2. (1955) S.C.J. 672 : (1958) 2 M.L.J.
(S.C.) 168 : (1955) 2 S.C.R. 603.

We will now revert to the main points of law raised before us for our decision. The first question which must be considered relates to the construction of section 20. Let us read the said section

"20 Save as is provided in section 23 no assessment made and no order passed under this Act or the rules made thereunder by the Commissioner or any person appointed under section 3 to assist him shall be called into question in any civil Court and save as is provided in sections 21 and 22, no appeal or application for revision shall lie against any such assessment or order."

Mr Sastri contends that section 20 can have no application to the present suit because the order of assessment which the appellant seeks to challenge in the present proceedings has been made by the relevant Sales tax authorities without jurisdiction. He concedes that even though an order of assessment made under the Act may be passed on a wrong conclusion of fact, it cannot be challenged by a suit having regard to the provisions of section 20. In other words, an erroneous order of assessment made under the Act would be entitled to the protection of section 20, but the said protection cannot be claimed by an order which is passed without jurisdiction. According to Mr Sastri, the impugned assessment contravenes the provisions of Article 286 and as such, is invalid. What the assessment order purported to tax was outside sale and it was beyond the competence of the authority to make the said order. Indeed, it was beyond the competence of the State Legislature to levy a tax in respect of an outside sale, and so, on the ultimate analysis, the impugned assessment is without jurisdiction and it cannot, therefore, be said to be an assessment made under the Act within the meaning of section 20.

Mr Sastri did not dispute the fact that the argument thus presented by him would be equally applicable to cases of assessment made erroneously in respect of transactions which are otherwise statutorily exempted from the operation of the Act. If a Sales Tax Statute exempts certain transactions from the purview of its charging section, and the appropriate authority makes an order of assessment in respect of such an exempted transaction, the assessment would be beyond its jurisdiction and can be impeached by a suit, section 20 will not protect such an assessment. No doubt, Mr Sastri emphasised the fact that the Constitutional prohibition against an assessment in respect of outside sales stood on a much higher pedestal than the prohibition by a statutory provision in a Sales Tax Act. The first prohibition is a Constitutional prohibition and its breach would entitle a citizen to claim the protection of Article 265 and Article 31 (1), but, on principle, according to Mr Sastri, a transaction which is exempted from assessment either by virtue of Article 286 or by virtue of any specific statutory provision, cannot be validly assessed, and an assessment made in respect of it cannot claim the status of an assessment made under the Act within the meaning of section 20. A suit would, therefore, be competent to challenge such an invalid assessment. That, in brief, is Mr Sastri's argument on the construction of section 20.

In dealing with this question, it is necessary to remember that the normal rule prescribed by section 9 of the Code of Civil Procedure is that the Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred. There is no doubt that a claim for the refund of sales tax alleged to have been paid by the appellants through mistake is a claim of a civil nature and normally it should be triable by the ordinary Courts of competent jurisdiction as provided by section 9 of the Code, but this section itself lays down that the jurisdiction of the civil Courts to try suits of a civil nature can be excluded either expressly or impliedly, and so, the point raised for our decision in the present appeal is whether on a fair and reasonable construction of section 20, it can be said that the jurisdiction of the civil Court is barred either expressly or impliedly.

Section 20 protects "assessment made under the Act or the rules made there under" by appropriate authorities. There can be little doubt that the clause "an assessment made" cannot mean the assessment properly or correctly made. The said clause takes in all assessments made or purported to have been made under

the Act. In its plaint the appellant is undoubtedly calling into question the assessment order made against it, and such a challenge to the assessment order is plainly prohibited by section 20. An order of assessment, though erroneous, and though based on an incorrect finding of fact, is, nevertheless, an order of assessment within the meaning of section 20, and section 20, in terms, provides that it will not be called in question in any civil Court.

This question has been recently considered by this Court in *Firm and Illuri Subbayya Chetty & Sons v. The State of Andhra Pradesh*¹. Dealing with section 18-A of the Madras General Sales Tax Act (IX of 1939), which corresponds to section 20 with which we are concerned in the present appeal, this Court observed that the expression "any assessment made under this Act" is wide enough to cover all assessments made by the appropriate authorities under this Act whether the said assessments are correct or not. It is the activity of the assessing officer acting as such officer which is intended to be protected and as soon as it is shown that exercising his jurisdiction and authority under this Act, an assessing officer has made an order of assessment, that clearly falls within the scope of section 18-A. It was also observed that whether or not an assessment has been made under this Act, will not depend on the correctness or accuracy of the order passed by the assessing authority.

This position is not seriously disputed by Mr. Sastri before us. He, however, contends that if the impugned order has been passed without jurisdiction, it cannot fall within the purview of section 20 of the Act. In other words, the contention is that when the appropriate authority purported to levy the tax on the appellant in respect of the transactions in question, it was attempting to assess outside sales and since the said assessment contravened Article 286, it was invalid and the order was without jurisdiction and as such, a nullity. How can an order passed by the appropriate authority without jurisdiction claim the protection of section 20, asks Mr. Sastri.

In deciding the validity of this contention, it is necessary to examine the scope of the jurisdiction conferred on the appropriate authorities by the relevant provisions of the Act. Jurisdiction is either territorial, or pecuniary, or in respect of the subject-matter. There is no difficulty about the assessing authorities' territorial and pecuniary jurisdiction in the present case. What is the nature of the jurisdiction conferred on the appropriate authority in respect of the subject-matter of sales tax? Has the appropriate authority been given power to examine the nature of the transaction and decide whether it is liable to tax or not; or, can the appropriate authorities proceed to exercise its power of imposing a tax only in cases where the transaction in question is assessable to such tax? In other words, is the decision about the character of the transaction the decision of a collateral fact, the finding on which alone confers jurisdiction on the tribunal to levy the tax or is it the decision on a question of fact which is left to be determined by the appropriate authority itself? If the jurisdiction conferred on the appropriate authority falls under the first category, then its finding that a particular transaction is taxable under the relevant provisions of the Act, would be a finding on a collateral question of fact, and it may be permissible to a party aggrieved by the said finding to contend that the tax levied on the basis of an erroneous decision about the nature of the transaction is without jurisdiction. If, however, the appropriate authority has been given jurisdiction to determine the nature of the transaction and proceed to levy a tax in accordance with its decision on the first issue, then the decision on the first issue cannot be said to be a decision on a collateral issue, and even if the said issue is erroneously determined by the appropriate authority, the tax levied by it in accordance with its decision cannot be said to be without jurisdiction.

As Halsbury has observed :

"The jurisdiction of an inferior tribunal may depend upon the fulfilment of some condition precedent or upon the existence of some particular fact. Such a fact is collateral to the actual matter

1. (1964) 1 S.C.R. 752 : (1964) 1 An.W.R. (S.C.) 5 :
(S.C.) 5 : (1963) 2 S.C.J. 725 : (1964) 1 M.L.J.

which the inferior tribunal has to try, and the determination whether it exists or not is logically and temporally prior to the determination of the actual question which the inferior tribunal has to try. The inferior tribunal must itself decide as to the collateral fact when at the inception of an inquiry by a tribunal of limited jurisdiction a challenge is made to its jurisdiction the tribunal has to make up its mind whether it will act or not and for that purpose to arrive at some decision on whether it has jurisdiction or not. There may be tribunals which by virtue of legislation constituting them have the power to determine finally the preliminary facts on which the further exercise of their jurisdiction depends but subject to that an inferior tribunal cannot by a wrong decision with regard to a collateral fact give itself a jurisdiction which it would not otherwise possess¹.

It would be noticed that Mr Sastri's argument that the impugned order of assessment is without jurisdiction and as such, does not fall within section 20, proceeds on the assumption that the finding of the appropriate authority that the transactions in question were taxable under the relevant provisions of the Act, is a finding on a fact which is collateral. The question is is this assumption well founded? In our opinion, the answer to this question must be in the negative.

In this connection, the relevant scheme of the Act by which necessary powers have been conferred on the appropriate authorities falls to be considered. Section 3 (1) provides that for carrying out the purposes of this Act, the Provincial Government may appoint any person to be Commissioner of Sale Tax and such other persons to assist him as the Provincial Government thinks fit. Section 3 (2) then lays down that persons appointed under sub section (1) shall exercise such powers as may be conferred and perform such duties as may be imposed on them by or under this Act. Section 4 deals with the appointment of a Tribunal and provides for its constitution. Section 5 is the charging section. Section 8 requires the registration of dealers; the expression 'dealer' having been defined by section 2 (c). Section 10 imposes an obligation on the dealers to make returns. Section 11 deals with the assessment of tax. Sub section (1) (a) provides that the amount of tax due from a registered dealer shall, in the case of first assessment, be assessed in respect of such period not exceeding twelve months as the Commissioner may determine. Sub sections (2), (3) and (4) of section 11 contain provisions in regard to the procedure which has to be followed by the Commissioner in determining the question about the liability of a dealer to pay assessment. The Commissioner has to take evidence, has to hear the dealer, can require further evidence to be led by the dealer on specific points and then reach his conclusion on the question as to whether the dealer is liable to be assessed, and if yes, to what extent? In passing his order of assessment, the Commissioner acts on the evidence led before him. Sub section (5) empowers the Commissioner to levy assessment to the best of his judgment in cases falling under it. It also authorises him to impose a penalty as therein specified. Section 11 A deals with turnover which has escaped assessment, and it confers authority on the Commissioner to pass an appropriate order of assessment in respect of the said category of cases. When the Commissioner makes an order of assessment in exercise of the powers conferred on him a right is given to the assessee to prefer an appeal and a revision under sections 21 and 22 respectively.

It would thus be seen that the appropriate authorities have been given power in express terms to examine the returns submitted by the dealers and to deal with the questions as to whether the transactions entered into by the dealers are liable to be assessed under the relevant provisions of the Act or not. In our opinion, it is plain that the very object of constituting appropriate authorities under the Act is to create a hierarchy of special tribunals to deal with the problem of levying assessment of sales tax as contemplated by the Act. If we examine the relevant provisions which confer jurisdiction on the appropriate authorities to levy assessment on the dealers in respect of transactions to which the charging section applies it is impossible to escape the conclusion that all questions pertaining to the liability of the dealers to pay assessment in respect of their transactions are expressly left to be decided by the

appropriate authorities under the Act as matters falling within their jurisdiction. Whether or not a return is correct ; whether or not transactions which are not mentioned in the return, but about which the appropriate authority has knowledge, fall within the mischief of the charging section ; what is the true and real extent of the transactions which are assessable ; all these and other allied questions have to be determined by the appropriate authorities themselves ; and so, we find it impossible to accept Mr. Sastri's argument that the finding of the appropriate authority that a particular transaction is taxable under the provisions of the Act, is a finding on a collateral fact which gives the appropriate authority jurisdiction to take a further step and make the actual order of assessment. The whole activity of assessment beginning with the filing of the return and ending with an order of assessment, falls within the jurisdiction of the appropriate authority and no part of it can be said to constitute a collateral activity not specifically and expressly included in the jurisdiction of the appropriate authority as such. We are, therefore, satisfied that Mr. Sastri is not right when he contends that the finding of the appropriate authority that a particular transaction is taxable under the charging section of the Act, is a finding on a collateral fact and it is only if the said finding is correct that the appropriate authority can validly exercise its jurisdiction to levy a sales tax in respect of the transactions in question. In fact, what we have said about the jurisdiction of the appropriate authorities exercising their powers under the Act, would be equally true about the appropriate authorities functioning either under similar Sales Tax Acts, or under the Income-tax Act.

This question was incidentally considered by a Special Bench of this Court in *Smt. Ujjam Bai v. State of Uttar Pradesh*¹. In that case, the petitioner, Ujjam Bai, challenged the validity of the sales tax levied on her on the ground that the notification issued on 14th December, 1957, had exempted 'bidis', like those which the petitioner's firm produced, from payment of sales tax. According to the petitioner, the appropriate authority had plainly misconstrued the notification when it held that the bidis produced by the petitioners firm were not entitled to claim the protection of the said notification. The petitioner had moved this Court under Article 32 of the Constitution. Broadly stated, the majority decision was that though the notification may have been misconstrued by the appropriate authority when it rejected the petitioner's contention that the said bidis fell within the purview of the notification, and so, were exempt from payment of tax, no relief could be granted to the petitioner under Article 32 on the sole ground that the impugned order of assessment was based on a misconstruction of the notification in question. The Act under which the notification was issued was valid ; the validity of the notification itself was not impeached ; and so, the narrow ground which the Court had to consider was if the appropriate authority misconstrued the notification and imposed a tax on a commodity which in fact fell within its protection, could the validity of such an order be impeached under Article 32 of the Constitution on the ground that it contravened the fundamental right of the petitioner under Article 19 (1) (g) ? The two answers given in accordance with the majority opinion were against the petitioner ; and so the majority decision can be said to have rejected the petitioner's argument that a question of jurisdiction was involved in the misconstruction of the notification in question. It would thus appear that according to the majority view, the question about the taxability of a particular transaction falls within the jurisdiction of the appropriate authorities exercising their powers under the taxing Act, and their decision in respect of it cannot be treated as a decision on a collateral fact the finding on which determines the jurisdiction of the said authorities.

It is true that the separate concurring judgments delivered by the learned Judges who spoke for the majority view indicate that their approach to the several problems posed by the two questions referred to the Special Bench, was not uniform and they emphasised different aspects in somewhat different ways ; but in regard to that aspect of the matter with which we are concerned in the present appeal there appears to

be unanimity amongst them. Indeed, even the minority judgment which radically dissented from the majority view in regard to the scope and effect of the powers of this Court under Article 32 and the extent of the fundamental right conferred on the citizen to move this Court by the said Article, does not appear to have differed from the majority view on this point.

Whilst we are referring to the decision of this Court in *Ujjam Bai's case*¹, we would batten to add that we are not dealing with the scope and effect of our powers under Article 32, or with the powers of the High Courts under Article 226. Our object in referring to the majority decision in *Ujjam Bai's case*¹ is merely to show that the tenor of the opinion expressed by the learned Judges in the said case is in support of the view that a finding recorded by a taxing authority as to the taxability of any given transaction cannot be said to be a finding on a collateral fact, but is a finding on a fact the decision of which is entrusted to the jurisdiction of such authority.

Mr. Sastri has no doubt referred us to the subsequent decision of this Court in the *State Trading Corporation of India Ltd v State of Mysore*², in which it appears to have been held that the taxing officer cannot give himself jurisdiction to tax an inter-State sale by erroneously determining the character of the sale transaction. The decision on the question about the character of the sale transaction seems to have been treated as a decision on a collateral fact. With respect, we may point out that the majority decision in *Ujjam Bai's case*¹ on which this conclusion is founded does not support that view. We ought, however, to add that in the case of *State Trading Corporation of India Ltd.*³ as in the earlier case of *Ujjam Bai*¹, this Court was dealing with a petition filed under Article 32; and as we have already indicated, we are not called upon to consider the extent of our jurisdiction under Article 32 when such questions are brought before us by citizens for relief on the ground that their fundamental rights have been contravened by assessment orders. At this stage, we are only dealing with the question as to whether Mr. Sastri is right in contending that an erroneous conclusion of the appropriate authority on the question about the character of the sale transactions on which the appellant has been taxed can be said to be without jurisdiction. In other words, if the appropriate authority, while exercising its jurisdiction and powers under the relevant provisions of the Act, holds erroneously that a transaction, which is an outside sale, is not an outside sale and proceeds to levy sales tax on it, can it be said that the decision of the appropriate authority is without jurisdiction? In our opinion, this question cannot be answered in favour of Mr. Sastri's contention. Whether or not such a conclusion can be challenged under Article 226 or under Article 32 of the Constitution, and if yes, under what circumstances, are matters with which we are not concerned in the present proceedings. For the purpose of construing section 20, we are not prepared to hold that an assessment based on an erroneous finding about the character of the transaction, is an assessment made without jurisdiction and as such, is outside the purview of section 20 of the Act. We would like to repeat that it is only this narrow question we are considering in the present appeal.

Reverting then to section 20, it seems to us plain that the words used in this section are so wide that even erroneous orders of assessment made would be entitled to claim its protection against the institution of a civil suit. Several decisions have been cited before us where similar questions have been considered. We may usefully refer to some of them. In *Secretary of State, represented by the Collector of South Arcot v. Mask & Company*⁴, the Privy Council had occasion to consider the effect of the provision contained in section 188 of the Sea Customs Act (VIII of 1878). The said provision was that every order passed in appeal under the said section shall, subject to the power of revision conferred by section 191, be final. Mask & Co. had instituted a suit in which it sought to recover duty collected from it under protest on the ground that it was illegally recovered. The trial Court had rejected the claim on

1. (1963) 1 S.C.R. 778.

2. (1963) 3 S.C.R. 792 : (1963) 2 S.C.J. 131.

3 L.R. (1940) 67 I.A. 222 : 1 L.R. 1940 Mad. 599 : (1940) 2 M.L.J. 140.

the ground that the suit was barred under section 188. On appeal, the High Court of Madras took a different view and held that the suit was competent. The Privy Council reversed the conclusion of the High Court and confirmed the view taken by the trial Judge. It would be noticed that the relevant words on which the controversy between the parties as to the competency of the suit in that case had to be resolved, were not as emphatic as they are in section 20, and yet, the Privy Council upheld the plea that the suit was barred. It is true that in the course of the discussion, the Privy Council has observed that

“it is settled law that the exclusion of the jurisdiction of the civil Courts is not to be readily inferred, but that such exclusion must either be explicitly expressed or clearly implied. It is also well-settled that even if jurisdiction is so excluded, the civil Courts have jurisdiction to examine into cases where provisions of the Act have not been complied with, or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure” (p. 236).

In the present case, we are not called upon to consider the merits of these observations or their scope and effect.

In *Raleigh Investment Company Ltd. v. Governor-General in Council*¹, section 67 of the Indian Income-tax Act (XI of 1922) which barred a suit, fell to be considered. The Privy Council held that the said provision barred a suit where the plaintiff sought to challenge an assessment order made by the appropriate tax authorities under the provisions of the said Act. In construing the effect of the words “no suit shall be brought in any civil Court to set aside or modify any assessment made under this Act” the Privy Council thought it necessary to enquire whether the Act contained machinery which enabled an assessee effectively to raise in the Courts the question whether a particular provision of the Income-tax Act bearing on the assessment made is or is not *ultra vires*. “The presence of such machinery”, observed the Privy Council

“though by no means conclusive, marches with a construction of the section which denies an alternative jurisdiction to enquire into the same subject-matter. The absence of such machinery would greatly assist the appellant on the question of construction and, indeed, it may be added that, if there were no such machinery, and if the section affected to preclude the High Court in its Ordinary Civil Jurisdiction from considering a point of *ultra vires*, there would be a serious question whether the opening part of the section, so far as it debarred the question of *ultra vires* being debated, fell within the competence of the Legislature”.

In other words, these observations indicate that the Privy Council took the view that where an appropriate authority is exercising its jurisdiction to levy a tax in respect of any transaction, it would be competent to such an authority to consider the validity of the taxing provisions themselves. We do not think it is necessary for us to examine this aspect of the matter in the present appeal, because the validity of the charging section is not impeached in the present proceedings. It is true that Mr. Sastri has challenged the validity of section 20, but the said section has no bearing on the assessment made, and so, that plea has no relevance to the point which the Privy Council was considering in the observations to which we have just referred.

On the question of construction, Mr. Sastri has relied on two decisions of this Court to which it is necessary to refer before we part with this topic. In *The Provincial Government of Madras (now Andhra Pradesh) v. J. S. Basappa*², it was held by this Court that the finality attached to orders passed in appeal by section 11 (4) of the Madras General Sales Tax Act (IX of 1939) was a finality for the purpose of the said Act and did not make valid an action which was not warranted by the Act, as for example, the levy of tax on a commodity which was not taxed at all or was exempt. We ought to add that this decision was based on the fact that the said Act at the relevant time did not contain section 18-A which came into force on 15th May, 1951; and it was section 18-A which was construed by this Court in *Firm and Illuri Subbaya Chetty & Sons*³.

1. L.R. (1947) 74 I.A. 50 at pp. 62, 63 : (1947) 2 M.L.J. 16.

2. (1964) 15 S.T.C. 144.

3. (1964) 1 S.C.R. 752 : (1963) 2 S.G.J. 725 : (1964) 1 M.L.J. (S.C.) 5 : (1964) 1 An.W.R. (S.C.) 5.

Mr Sastri has also referred to the majority decision in the case of *Bharat Kala Bhandar Ltd v Municipal Committee, Dhamangaon*¹. In that case, according to the majority decision, section 84 (3) of the Central Provinces Municipalities Act, 1922 which deals with "Bar of other proceedings", did not make incompetent the suit with which the Court was dealing. The said section provides that —

"No objection shall be taken to any valuation assessment levy nor shall the liability of any person to be assessed or taxed be questioned, in any other manner or by any other authority than is provided in this Act

According to the majority view, the bar created by this provision did not amount to the exclusion of the jurisdiction of the civil Court to entertain a claim for refund of the tax alleged to be illegally recovered, because there were no words in the said provision which could be construed as excluding civil Courts' jurisdiction either expressly or impliedly. The minority view, however, held that a suit for refund was barred.

We do not think Mr Sastri can successfully advance his case before us by relying on these two decisions. After all, as the Privy Council observed in the case of *Mask & Co*² the determination of the question as to whether section 20 bars the present suit, must rest on the terms of section 20 themselves, because that is the provision under consideration "and decisions on other statutory provisions are not of material assistance, except in so far as general principles of construction are laid down (page 237). Besides, in regard to these two decisions, we may with respect point out that they do not purport to lay down a general rule that the jurisdiction of a civil Court cannot be excluded unless it is specifically provided that a suit in a civil Court would not lie. In fact as the decision of the Privy Council in the case of *Mask & Co*², shows, the jurisdiction of a civil Court can be excluded even without such an express provision. In every case, the question about the exclusion of the jurisdiction of civil Courts either expressly or by necessary implication must be considered in the light of the words used in the statutory provision on which the plea is rested, the scheme of the relevant provisions, their object and their purpose. We would also like to make it clear that we do not think it is necessary in the present case to consider whether the majority opinion in the case of *Bharat Kala Bahadar Ltd*¹ was justified in casting a doubt on certain observations made by the Privy Council in *Raleigh Investments Co's case*³, or on the validity or the propriety of the conclusion in respect of the effect of section 67 of the Income tax Act.

Mr Sastri has also invited our attention to the decision of the House of Lords in *Pyx Granite Co, Ltd v Ministry of Housing and Local Government and others*⁴. In that case, the House of Lords repelled the preliminary objection raised by the respondents that the Court had jurisdiction to grant the declarations asked for, since by the combined effect of sections 15 and 17 of the Town and Country Planning Act, 1947, the decision of the Minister on an application to determine whether permission was required was made final and the only method of determining such a question was that provided by section 17 (1), and that the wide discretion conferred by section 144 on the Minister to impose conditions disentitled the company from coming to the Court for a declaration that the conditions were invalid. In coming to the conclusion that the jurisdiction of the civil Court was not excluded, the House of Lords noticed that there was nothing in section 17 or in the Act which excluded the jurisdiction of the Court to grant declarations, section 17 merely provided an alternative method of having the question determined by the Minister. "It is a principle not by any means to be whittled down," said Viscount Simonds, "that the subject's recourse to Her Majesty's Courts for the determination of his rights is not to be excluded except by clear words. That is, as McNair, J., called it in *Francis v Newsley and West Drayton Urban District Council*⁵, a 'fundamental' rule, from which I would not for my part sanction any departure." Approaching the task of construing section 17 from this point of view, his Lordship came to the

1 (1965) 2 ITJ 657 (1965) 2 SCJ

741
2 L.R. (1940) 67 1 A 222 1 L.R. (1940)
Mad 599 (1940 2 M.L.J. 140

3 L.R. (1917) 74 I.A. 50 at pp 62-63

(1917) 2 M.L.J. 16

4 L.R. (1960) A.C. 260 at p 286

5 L.R. (1957) 2 Q.B. 136, 148

conclusion that there was nothing in section 17 which excluded the jurisdiction of the civil Court to entertain the claim in question. We do not see how this decision can afford any assistance to the appellant.

There is one more aspect of the matter which must be considered before we finally determine the question as to whether section 20 excludes, the jurisdiction of the civil Court in entertaining the present suit. Whenever it is urged before a civil Court that its jurisdiction is excluded either expressly or by necessary implication to entertain claims of a civil nature, the Court naturally feels inclined to consider whether the remedy afforded by an alternative provision prescribed by a special statute is sufficient or adequate. In cases where the exclusion of the civil Courts' jurisdiction is expressly provided for, the consideration as to the scheme of the statute in question and the adequacy or the sufficiency of the remedies provided for by it may be relevant but cannot be decisive. But where exclusion is pleaded as a matter of necessary implication, such considerations would be very important, and in conceivable circumstances, might even become decisive. If it appears that a statute creates a special right or a liability and provides for the determination of the right and liability to be dealt with by tribunals specially constituted in that behalf, and it further lays down that all questions about the said right and liability shall be determined by the tribunals so constituted, it becomes pertinent to enquire whether remedies normally associated with actions in civil Courts are prescribed by the said statute or not. The relevance of this enquiry was accepted by the Privy Council in dealing with section 67 of the Income-tax Act in *Raleigh Investment Co.s' case*¹, and that is the test which is usually applied by all civil Courts.

In the present case, the appellant wants relief of refund of tax which is alleged to have been illegally recovered from it by the respondent, and the ground on which the said relief is claimed is that at the time when the tax was recovered, the appellant was under a mistake of fact and law. According to the appellant, even the respondent might have been labouring under the same mistake of fact and law, because the true constitutional and legal position in regard to the jurisdiction and authority of different States to recover sales tax in respect of outside sales was not correctly appreciated until this Court pronounced its decision in *The Bengal Immunity Co.'s case*.² That being so, can it be said that the Act provides an appropriate remedy for recovering a tax alleged to have been illegally levied and collected, where the party asking for the said relief pleads a mistake of fact and law? It would be noticed that this inquiry may have some relevance in construing the terms of section 20, and it would be both relevant and material in considering the question of the constitutionality of section 20. That is the two-fold purpose which such an inquiry would serve in the present case. If we are satisfied that the Act provides for no remedy to make a claim for the recovery of illegally collected tax and yet section 20 prohibits such a claim being made before an ordinary civil Court, the Court may hesitate to construe section 20 as creating an absolute bar, or if such a construction is not reasonably possible, the Court may seriously examine the question about the constitutionality of such express exclusion of the civil Court's jurisdiction having regard to the provisions of Articles 19 and 31 of the Constitution. It is with this two-fold object that this aspect of the matter must now be examined.

Before proceeding to examine this matter, we ought to refer to the decision of this Court in the *Sales Tax Officer, Banaras and others v. Kanhaiya Lal Mukundlal Saraf*³. In that case, this Court has held that the term "mistake" in section 72 of the Indian Contract Act comprises within its scope a mistake of law as well as a mistake of fact and that, under that section a party is entitled to recover money paid by mistake or under coercion, and if it is established that the payment, even though it be of a tax, has been made by the party labouring under a mistake of law, the party receiving the money is bound to repay or return it though it might have been paid voluntarily, subject, however, to questions of estoppel, waiver,

1. L.R. (1947) 74 I.A. 50 at pp. 62-63 :
(1947) 2 M.L.J. 16.

2. (1955) 2 S.C.R. 603 : (1955) S.C.J. 672 :
(1955) 2 M.L.J. (S.C.) 168.

3. (1959) S.C.R. 1350 : (1959) S.C.J. 53 :
(1959) 1 An.W.R. (S.C.) 35 : (1959) 1 M.L.J.
(S.C.) 35.

limitation or the like. Basing himself on this decision, Mr Sastri contends that since the Act does not provide for adequate remedy to recover illegally collected tax from the respondent, we should either put a narrow construction on section 20 so as to permit institution of a suit like the present, or, in the alternative, should strike it down as constitutionally invalid. If a citizen is deprived of his property illegally by recovering from him unauthorisedly an amount of tax where no such tax is recoverable from him, he ought to have a proper and appropriate remedy to ventilate his grievance against the State. Normally, such a remedy would be in the form of a suit brought before an ordinary civil Court, it may even be a proceeding before a specially appointed tribunal under the provisions of a tax statute, and it can also be an appropriate proceeding either under Article 226, or under Article 32 of the Constitution.

In support of this contention Mr Sastri has referred to the decision of the Privy Council in *Commissioner for Motor Transport v Antill Ranger & Co Pt Ltd, State of New South Wales and others v Edmund T Lennon Pty Ltd*¹. In that case section 3 of the State Transport Co-ordination (Barring of Claims and Remedies) Act 1954 had provided, *inter alia* that every cause of action against Her Majesty or the State of New South Wales for the recovery of any sums collected in relation to the operation of any public motor vehicle in the course of or for the purposes of inter State trade before the commencement of this Act which were collected pursuant to the relevant provisions of the principal Act shall be extinguished. When a claim made for the refund of tax illegally recovered was resisted on the ground that it was incompetent in view of section 3, it was held that the denial of the right to recover money paid in satisfaction of charges which were illegal by virtue of section 92 of the Commonwealth of Australia Constitution offended equally against section 92. In other words, where the unpugned statutory provision purported to extinguish absolutely a cause of action it was struck down as unconstitutional.

Let us, therefore, examine the question as to whether the Act with which we are concerned in the present appeal, provides for a remedy to claim a refund of tax alleged to have been illegally recovered. Section 13 of the Act expressly provides for refunds. It lays down that the Commissioner shall in the prescribed manner, refund to a registered dealer applying in this behalf any amount of tax paid by such dealer in excess of the amount due from him under this Act. The proviso to this section prescribes a period of limitation of twenty-four months from the date on which the order of assessment was passed or within twelve months of the final order passed on appeal, revision, or reference in respect of the order of assessment, whichever period is later. Then, we have section 21 which provides for the remedy of an appeal, and section 22 which provides for a revisional remedy. It is significant that though section 21 (1) prescribes a period of sixty days for appeal and section 22 prescribes a period of four months for revision under section 22 B the prescribed authority is given power to extend the period of limitation if it is satisfied that the party applying for such extension had sufficient cause for not preferring the appeal or making the application within such period. Section 23 A provides for rectification of mistake. It is thus clear that the appellant could have either appealed or applied for revision and prayed for condonation of delay on the ground that the mistake which was responsible for the recovery of the tax illegally levied, was discovered on the 6th September, 1955 because such a plea would have been perfectly competent under section 22 B. In other words if the appellant had pursued a remedy available to it under section 21 or section 22 read with section 22 B, its case would have been considered by the appropriate authority and the validity of the grounds set up by it for the refund of the tax in question would have been legally examined. Therefore, it cannot be said that even for the claim which the appellant seeks to make in the present suit there is no alternative remedy prescribed by the Act. This conclusion serves a double purpose. It makes it easier to construe the wide words used in section 20 and hold that they constitute an absolute bar against the institution of the present suit and it also helps the respondent to repel

the plea of the appellant that section 20 if it is so widely construed, is unconstitutional. Our conclusion, therefore, is that section 20 should be construed in the same manner in which section 18-A of the Madras General Sales Tax Act was construed by this Court in *Firm and Illuri Subbaya Chetty & Son*¹, and that even on this wide construction, the said section is constitutionally valid.

This conclusion, however, does not finally dispose of the appeal. - Though the appellant's suit may be incompetent in so far as the appellant seeks for a decree for refund, it still remains to be considered whether its suit can be said to be incompetent in so far as it seeks to challenge the validity of section 20 itself. It would be recalled that the alternative claim made by the appellant in its plaint was that section 20 on which a plea of bar is raised by the respondent, is invalid. The High Court has not considered this aspect of the matter ; but since the appellant has been allowed to raise the point about the validity of section 20, we must deal with it.

This point presents no difficulty whatever. The bar created by section 20 cannot obviously be pleaded where the validity of section 20 itself is challenged. That can of course be done by a separate suit. In terms section 20 is confined to cases where the validity of assessment orders made under the Act is challenged. The said provision cannot take in a challenge to the validity of section 20 itself, and so, we must hold that technically, the appellant's suit is competent in so far as it seeks to challenge the validity of section 20. This finding, however, is of no material assistance to the appellant, because even after it succeeds on this point, it has still to face the plea of the respondent that on the merits, the suit is barred; and on that plea, the appellant must fail, because section 20 is a bar to the appellant's claim that the amount in question which is alleged to have been illegally recovered from is should be refunded to it. That is a matter which falls directly within the mischief of section 20.

What then is the ultimate position in this case? The Act under which tax was recovered from the appellant is valid and so is the charging section valid, the appropriate authorities dealt with the matter in regard to the taxability of the impugned transactions in accordance with the provisions of the Act and in consequence, tax in question was recovered on the basis that the said transactions were taxable under the Act. The appellant contends that the transactions were outside sales and they did not and could not fall under the charging section because of Article 286, and it argues that the tax was levied because both the appellant and the appropriate authorities committed a mistake of fact as well as law in dealing with the question. Assuming that such a mistake was committed, the conclusion that the transactions in question fell within the purview of the charging section cannot be said to be without jurisdiction or a nullity and the assessment based even on such an erroneous conclusion would claim the protection of section 20. If, after discovering the mistake, the appellant had moved the appropriate authorities under the relevant provisions of the Act, its claim for refund would have been considered on the merits. Having failed to take recourse to the said remedy, it may have been open to the appellant to move the High Court under Article 226. Whether or not in such a case, the jurisdiction of the High Court could have been effectively invoked, is a matter on which we propose to express no opinion. As we have pointed out during the course of this judgment, we are not dealing with the scope and effect of the High Court's jurisdiction under Article 226 as well as the scope and effect of this Court's jurisdiction under Article 32 *vis-a-vis* such claims for refund of tax alleged to have been illegally recovered.

In the result, the appeal fails and is dismissed with costs.

V.K.

Appeal dismissed.

1. (1963) 2 S.C.J. 725 : (1964) 1 M.L.J. (S.C.) 752.
5 : (1964) 1 An.W.R. (S.C.) 5 : (1964) 1 S.C.R.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction)

PRESENT — P B GAJENDRAGADKAR, *Chief Justice*, K N WANCHOO, J C SHAH
AND J R MUDHOLKAR, JJ

Mulkharam (India), Private Ltd, and others

*Appellants**

Chamanlal Bros

Respondents

Civil Procedure Code (V of 1908), Order 37 rules 2 and 3 (as amended in Bombay) and Order 49 rule 3 (5)—Suits falling within the ambit of Order 37—Leave to defend under Order 37, rule 3 with or without conditions—Grant of—Relevant considerations—Suit on promissory note filed in the Original Side of a Chartered High Court—Grant of conditional leave to defend by High Court—No reasons given for imposition of condition—Validity of order

The provisions of Order 37 of the Civil Procedure Code (V of 1908) have been enacted to ensure speedy decisions in cases of certain types which may be compendiously described as commercial causes. This has to be borne in mind for the purpose of deciding whether leave under Order 37, rule 3 to defend a suit falling within the ambit of Order 37, rule 2 should be given or withheld and if given should be subjected to a condition. If upon consideration of material placed before it the Court comes to the conclusion that the defence is a sham one or is fantastic or highly improbable it would be justified in putting the defendant upon terms before granting leave to defend. Even when a defence is plausible but is improbable the Court would be justified in coming to the conclusion that the issue is not a triable issue and put the defendant on terms while granting leave to defend. It is indeed not easy to say in many cases whether the defence is a genuine one or not and therefore it should be left to the discretion of the trial judge who has experience of such matters both at the Bar and the Bench to form his own tentative conclusion about the quality or nature of the defence and determine the conditions upon which leave to defend may be granted. If the judge is of opinion that the case raises a triable issue then leave should ordinarily be granted unconditionally. On the other hand if he is of opinion that the defence raised is frivolous, or false, or sham, he should refuse leave to defend altogether. Unfortunately, however, the majority of cases cannot be dealt with in a clear cut way like this and the judge may entertain a genuine doubt on the question as to whether the defence is genuine or sham or in other words, whether it raises a triable issue or not. It is to meet such cases that the amendment to Order 37, rule 2 made by the Bombay High Court contemplates that even in cases where an apparently triable issue is raised the Judge may impose conditions in granting leave to defend. Thus this is a matter in the discretion of the trial judge and in dealing with it, he ought to exercise his discretion judicially. Care must be taken to see that the object of the rule to assist the expeditious disposal of commercial causes to which Order 37 of the Civil Procedure Code applies, is not defeated. Care must also be taken to see that real and genuine triable issues are not shut out by unduly severe orders as to deposit. In a matter of this kind, it would be undesirable and inexpedient to lay down any rule of general application.

Whether the defence raises a triable issue or not has to be ascertained by the Court from the pleadings before and the affidavits of parties and it is not open to it to call for evidence at that stage.

Where a Chartered High Court has granted only conditional leave under Order 37, rule 3 to defend a suit based on a promissory note the order cannot be challenged on the ground that the order of the High Court does not give reasons for imposing conditions. It is true that when a subordinate Court makes an order which is open to appeal or revision it should give some reasons in support of that order. But this principle cannot apply to an order made by a High Court for though an appeal lies against its order under the Letters Patent it cannot be likened to an appeal under section 96 or a revision application under section 115 of the Code of Civil Procedure. Moreover Order 49 rule 3 (5) of the Civil Procedure Code, provides that nothing contained in rules 1 to 8 of Order 20 will apply to any Chartered High Court in exercise of its Ordinary or Extraordinary Civil Jurisdiction.

When a plaintiff has more than one relief on the same cause of action, the mere fact that he has relinquished some of the reliefs to avail himself of the summary procedure provided in Order 37 of the Civil Procedure Code, could not adversely affect his suit under Order 37.

(On facts Their Lordships rejected a contention to the effect that the promissory notes upon which the present suit was based was only a collateral security for the performance of an agreement between the parties relating to the business of export of pulses and that therefore the suit was not of a nature which fell within the ambit of Order 37, rule 2 of the Civil Procedure Code)

Appeal by Special Leave from the Judgment and Order dated 19th October, 1964, of the Bombay High Court in Appeal No. 70 of 1964.

Yogeshwar Prasad, Hardev Singh and M. V. Goswami, Advocates, for Appellants.

G. S. Pathak, Senior Advocate, (*K. R. Chaudhuri*, Advocate, with him), for Respondents.

The Judgment of the Court was delivered by

Mudholkar, J.—The question which we have to consider in this appeal by Special Leave is whether the trial judge was right in granting leave to the appellants to defend the suit based upon promissory notes executed by the appellant No. 1, which was instituted on the Original Side of the High Court at Bombay on condition that the appellants deposited security to the extent of Rs. 70,000. The other appellants are sought to be made liable upon an indenture of guarantee dated 20th November, 1962, with respect to the amounts advanced to the appellant No. 1. The procedure followed in the case was that set out in Order 37, Civil Procedure Code. Rules 2 and 3 of this Order have been amended by the Bombay High Court, Sub-rule (1) of rule 2 provides that suits of certain kinds specified therein may be instituted by presenting a plaint in the form prescribed but the summons shall be in Form 4 in Appendix III or in such other Form as may from time to time prescribed. Suits upon bills of exchange, hundis or promissory notes or for liquidated amounts are some of the kinds of suits which can be instituted under this provision. Sub-rule (2) provides that in suits of this kind the defendant shall not defend the suit unless he enters an appearance and obtains leave from the judge as provided in Order 37 so to defend. It further provides that in default of entering an appearance and of his obtaining such leave to defend the allegations in the plaint shall be deemed to be admitted and the plaintiff shall be entitled to a decree as prayed for in the plaint. Sub-rules (2) and (3) of rule 3 of Order 37 as amended by the High Court run thus :

“(2) If the defendant enters an appearance, the plaintiff shall thereafter serve on the defendant a summons for judgment returnable not less than ten clear days from the date of service supported by an affidavit verifying the cause of action and the amount claimed and stating that in his belief there is no defence to the suit.

(3) The defendant may at any time within ten days from the service of such summons for judgment by affidavit or otherwise disclosing such facts as may be deemed sufficient to entitle him to defend, apply on such summons for leave to defend the suit. Leave to defend may be granted to him unconditionally or upon such terms as to the Judge appear just”.

The appellants filed an affidavit as required by sub-rule (3) purporting to disclose facts sufficient to entitle them to defend the suit. Upon a perusal of the plaint and the affidavits of parties and documents filed along with the plaint the learned judge thought it fit to grant only conditional leave to the appellants to defend the suit. The amount for which the plaintiff-respondents have claimed relief in the suit is Rs. 4,05,434.38. As against this claim the Court has ordered the appellants to deposit security for Rs. 70,000 only. The appellants considering themselves aggrieved by the order preferred an appeal under Letters Patent which was summarily dismissed by the appeal Court. They have now come up by Special Leave to this Court. In support of the appeal Mr. Yogeshwar Prasad has raised two points. The first is that the defence disclosed by the appellants in their affidavit raises a triable issue and that therefore it was incumbent upon the learned trial judge to grant unconditional leave to defend. The second ground is that the promissory notes upon which the suit is based is only a collateral security for the performance of the agreement between the parties relating to the export of pulses and therefore the suit was not of a nature which fell within the ambit of Order 37, rule 2 of the Code.

It will be convenient to deal with the second point first. The respondents in their plaint have alleged that from time to time they advanced monies to the

High Courts like the High Court at Bombay the decision relied upon cannot be pressed in aid

Learned Counsel relied upon a decision of this Court in *Santhosh Kumar v Bhat Mool Singh*¹ and particularly upon a passage at page 1216. That was a case in which the Court of Commercial Subordinate Judge, Delhi, had held that the defence raised a triable issue but that defence was vague and was not *bona fide* because the defendant had produced no evidence to prove his assertion. For these reasons the Court granted leave to defend the suit on the condition of the defendant giving security for the entire claim in the suit and costs thereon. This Court held that the test is to see whether the defence raises a real issue and not a sham one, in the sense that, if the facts alleged by the defendant are established there would be a good, or even a plausible defence on those facts. If the Court is satisfied about that, leave must be given unconditionally. This Court further held that the trial Court was wrong in imposing a condition about giving security on the ground that documentary evidence had not been adduced by the defendant. This Court pointed out that the stage of proof can only arise after leave to defend has been granted and that the omission to adduce documentary evidence would not justify the inference that the defence sought to be raised was vague and not *bona fide*. While dealing with the matter Bose, J., who spoke for the Court observed (page 1216)

'Taken by and large the object is to see that the defendant does not unnecessarily prolong the litigation and prevent the plaintiff from obtaining an early decree by raising untenable and frivolous defences in a class of cases where speedy decisions are desirable in the interests of trade and commerce. In general therefore the test is to see whether the defence raises a real issue and not a sham one in the sense that if the facts alleged by the defendant are established there would be a good or even a plausible defence on those facts.'

The latter part of the observations of the learned Judge have to be understood in the background of the facts of the case this Court was called upon to consider. The trial judge being already satisfied that the defence raised a triable issue was not justified in imposing a condition to the effect that the defendant must deposit security because he had not adduced any documentary evidence in support of the defence. The stage for evidence had not been reached. Whether the defence raises a triable issue or not has to be ascertained by the Court from the pleadings before it and the affidavits of parties and it is not open to it to call for evidence at that stage. If upon consideration of material placed before it the Court comes to the conclusion that the defence is a sham one or is fantastic or highly improbable it would be justified in putting the defendant upon terms before granting leave to defend. Even when a defence is plausible but is improbable the Court would be justified in coming to the conclusion that the issue is not a triable issue and put the defendant on terms while granting leave to defend. To hold otherwise would make it impossible to give effect to the provisions of Order 37 which have been enacted, as rightly pointed out by Bose, J., to ensure speedy decision in cases of certain types. It will be seen that Order 37, rule 2 is applicable to what may be compendiously described as commercial causes. Trading and commercial operations are liable to be seriously impeded if, in particular, money disputes between the parties are not adjudicated upon expeditiously. It is these considerations which have to be borne in mind for the purpose of deciding whether leave to defend should be given or withheld and if given should be subjected to a condition.

It may be mentioned that this Court relied upon the decision in *Jacobs v. Booth's Distillery Co*², in which the House of Lords held that whenever a defence raises a triable issue leave must be given and also referred to two subsequent decisions where it was held that when such is the case leave must be given unconditionally. In this connection we may refer to the following observations of Devlin, L.J., in *Fieldrank Ltd v Stein*³

1 (1958) S.C.J. 434 (1958) 1 M.L.J. (S.C.)
159 (1958) 1 An.W.R. (S.C.) 159 (1958) S.C.R.
1211

2. (1901) 85 L.T. 262

3 (1961) 3 A.E.L.R. 681 at 682-683

"The broad principle, which is founded on *Jacob v. Booth's Distillery Co.*¹, is summarised on p. 266 of the Annual Practice (1962 Edn.) in the following terms :

"The principle on which the Court acts is that where the defendant can show by affidavit that there is a *bona fide* triable issue, he is to be allowed to defend as to that issue without condition."

If that principle were mandatory, then the concession by Counsel for the plaintiffs that there is here a triable issue would mean at once that the appeal ought to be allowed; but Counsel for the plaintiffs has drawn our attention to some comments that have been made on *Jacobs v. Booth's Distillery Co.*¹ They will be found at pp. 251 and 267 of the Annual Practice, 1962. It is suggested (sec p. 251) that possibly the case, if it is closely examined, does not go as far as it has hitherto been thought to go; and on the top of p. 267 the learned editors of Annual Practice have this note :

'The condition of payment into Court, or giving security, is nowadays more often imposed than formerly, and not only where the defendant consents but also where there is a good ground in the evidence for believing that the defence set up is a sham defence and the Master is prepared very nearly to give judgment for the plaintiff.'

It is worth-noting also that in *Lloyd's Banking Co. v. Ogle*² in a dictum which was said to have been overruled or qualified by *Jacob v. Booth's Distillery Co.*¹, Bramwell B., had said that :

'.....those conditions (of bringing money into Court or giving security) should only be applied when there is something suspicious in the defendant's mode of presenting his case.'

I should be very glad to see some relaxation of the strict rule in *Jacob v. Booth's Distillery Co.*¹, I think that any judge who has sat in chambers in R.S.C. Order 14 summonses has had the experience of a case in which, although he cannot say for certain that there is not a triable issue, nevertheless he is left with a real doubt about the defendant's good faith and would like to protect the plaintiff, especially if there is no grave hardship on the defendant in being made to pay money into Court. I should be prepared to accept that there has been a tendency in the last few years to use this condition more often than it has been used in the past, and I think that that is a good tendency."

These observations as well as some observations of Chagla, C.J., in *Rawalpindi Theatres Private Ltd. v. M/s. Film Group, Bombay*³, may well be borne in mind by the Court sitting in appeal upon the order of the trial judge granting conditional leave to defend. It is indeed not easy to say in many cases whether the defence is a genuine one or not and therefore it should be left to the discretion of the trial judge who has experience of such matters both at the Bar and the Bench to form his own tentative conclusion about the quality or nature of the defence and determine the conditions upon which leave to defend may be granted. If the Judge is of opinion that the case raises a triable issue, then leave should ordinarily be granted unconditionally. On the other hand, if he is of opinion that the defence raised is frivolous, or false, or sham, he should refuse leave to defend altogether. Unfortunately, however, the majority of cases cannot be dealt with in a clear cut way like this and the judge may entertain a genuine doubt on the question as to whether the defence is genuine or sham or in other words whether it raises a triable issue or not. It is to meet such cases that the amendment to Order 37, rule 2 made by the Bombay High Court contemplates that even in cases where an apparently triable issue is raised the Judge may impose conditions in granting leave to defend. Thus this is a matter in the discretion of the trial judge and in dealing with it, he ought to exercise his discretion judiciously. Care must be taken to see that the object of the rule to assist the expeditious disposal of commercial causes to which the Order applies is not defeated. Care must also be taken to see that real and genuine triable issues are not shut out by unduly severe orders as to deposit. In a matter of this kind, it would be undesirable and inexpedient to lay down any rule of general application.

For these reasons we uphold the order of the trial judge and affirmed by the appeal Court and dismiss the appeal with costs. At the request of the Counsel for the appellants we extend the time for depositing security by a period of two months from the date of our judgment.

V.K.

Appeal dismissed.

1. (1901) 85 L. T. 262.

2. 1 Ex. D at p. 264.

3. (1958) Bom.L.R. 1373 at p. 1374.

THE SUPREME COURT OF INDIA

(Civil Appellate Jurisdiction)

PRESENT — P B GAJENDRAGADKAR, *Chief Justice*, K N WANCHOO, J C SHAH, J R MUDHOLKAR AND S M SIKRI, JJ

The Joint Chief Controller of Imports and Exports, Madras
(In all the Appeals)

*Appellant**

M/s Ammichand Mutha etc

Respondents

Imports and Exports Control Act (XVIII of 1917) and Imports Control Order (1955)—Red book of Rules and Procedure for Import trade control for period January—June 1957—Instructions 71 and 72—Scope—Approval of Chief Controller to a vision of quota between partners on dissolution—Relates back to date of dissolution—Recognition of quota certificates admissible to partners of dissolved firm after expiry of licensing period—If ground for refusing licence

By Majority—Where a firm is dissolved and the partners agree to divide the business, assets and liability the partners shall get their respective share in the quota rights (granted to the firm as established importers) according to the terms of the agreement. Such rights would accrue to each of the partners from the date of the agreement. Even where the approval of the Chief Controller is made after the licensing period for which application has been made is over the approval dated back to the time when the firm was dissolved and the agreement to divide the quota rights was made. The licensing authority has therefore to deal with the application for licence on the basis that the approved quotas were given to the partners of the dissolved firm from the date of the agreement and cannot refuse the licence only on the ground that the approval was granted after the import period had expired.

Joint Controller v H V Jain, (1959) 2 M.L.J. 308 (1959) M.L.J. (Cri.) 737 I.L.R. (1959) Mad 850, approved and *Jagannath v Varadkar*, A.I.R. 1961 Bom 244 overruled.

Per Mudholkar J.—The application made by a person on a form meant for established importers must be deemed to be a defective one if on the date on which he made it his rights in the quota had not been recognised and he was not an established importer. The subsequent recognition of his share in the quota does not validate the application.

Appeals by Special Leave from the Judgments and Orders dated 10th December, 1962, and 18th March, 1963, of the Madras High Court in Writ Appeals Nos 27, 47 and 48 of 1961, and 74 of 1963, 91 of 1960 and 26, 49 and 50 of 1961.

C K Daphtary, Attorney General for India, (K P R Shankar Dass, Advocate and R. H. Dhebar and R. N. Sachthy, Advocates, with him), for Appellant (In all the Appeals)

A V Viswanatha Sastri, Senior Advocate, (S Balakrishnan and B R Dolia Advocates, and R K Garg, S G Agarwal, D P Singh and M K Ramamurthi, Advocates of M/s Ramamurthi & Co, with him) for Respondents (In CAs Nos 60 to 62 of 1965)

Miss Lily Thomas, Advocate, for Respondent (In CA No 316 of 1965)

B R Dolia, E C Agarwala and P C Agrawala, Advocates, for Respondents (In CAs Nos 317 to 320 of 1965)

The Court delivered the following Judgments —

Wanchoo, J. (For the majority) — These eight appeals by Special Leave against the judgment of the Madras High Court raise a common question of law and will be dealt with together. It will be enough if we give the facts of one case *Joint Chief Controller v Ammichand Mutha* (C.A. No 60 of 1965) for the facts in the other cases are more or less similar. It appears that there was a partnership firm known as Naimmull Juthmull. This firm had a quota for import of certain things,

as it was an 'established importer'. Established importers used to be given quotas every year and thereafter licences used to be issued to such importers, on the basis of the quota allotted to them. The quota was not inheritable or transferable, but under certain circumstances to which we shall refer later it could be divided between partners where the quota-holder was a firm. The firm in the present case had three partners, namely, Amin Chand Mutha, Nainmull Nathmull and Juthmull Mutha. On 1st January, 1957, the firm was dissolved. Consequently in accordance with the instructions contained in what is known as the Red Book, application was made on 25th March, 1957, by one of the partners (Amin Chand Mutha) for the grant of a licence with respect to the period January—June, 1957. It was noted in the application that quota certificates had been issued in favour of the firm Nainmull Juthmull of which the applicant was a partner. That firm had been dissolved and application had been made to the Chief Controller of Imports, New Delhi for division of the quota of the firm between the three partners of the firm who had separated. It may be mentioned that application for licence had to be made before the 31st of March of the January—June, 1957 period.

It was stated that the application had already been made to the Chief Controller on behalf of the dissolved firm on 4th March, 1957, for division of the quota between the three partners and was pending when the application for licence was made by Amin Chand Mutha on 25th March, 1957. The application for licence had to be made to the Joint Chief Controller of Imports at Madras where the partners of the dissolved firm were carrying on business. The Joint Chief Controller informed the respondent on 8th April, 1957, that before any licence could be given to him he should get the approval of the Chief Controller about the division of the quota rights of the dissolved firm. It appears that there was some delay in the office of the Chief Controller for reasons into which it is unnecessary to go, and the Chief Controller informed the partner concerned in September, 1957 that instructions had been issued to the licensing authority to the effect that quota certificates admissible to the dissolved partnership firm should in future be divided between the three partners in certain proportions which it is unnecessary to set out. Thereafter the Joint Chief Controller was approached to grant a licence. But on 9th January, 1958, the Joint Chief Controller informed the partner concerned that it was regretted that his request for the issue of licence for the period January—June, 1957 could not be acceded to since the transfer of quota rights in his favour had been recognised by the Chief Controller only after the expiry of the licensing period to which the application related. It appears that there was then an appeal from this order of the Joint Chief Controller which failed. Then came the writ petition to the High Court in December, 1958 or January, 1959, and the main contention on behalf of the respondents was that the Joint Chief Controller could not refuse the issue of licences on the ground that the Chief Controller's approval as to the division had been made after the period of January—June, 1957 had come to an end. The High Court allowed the petition holding, on the basis of an earlier decision of that Court in the *Joint Controller v. H. V. Jain*¹, that the approval of the Chief Controller to the division of the quota between partners of a dissolved firm related back to the date of the dissolution of the firm and the partners would be entitled to import licences on the basis of such approval subject to the licensing order. Thereupon the Joint Chief Controller went in appeal and the Division Bench of the High Court which heard the appeals upheld the order of the learned Single Judge. The High Court having refused leave to appeal, the appellant obtained Special Leave from this Court; and that is how the matter has come up before us.

Before we consider the point raised in the present appeals we shall briefly refer to the system of licensing which came into force after the Imports and Exports (Control) Act (XVIII of 1947), (hereinafter referred to as the Act). By section 3 of the Act, the Central Government was given power to provide for prohibiting, restricting or otherwise controlling in all cases or in specified classes of cases, and

1. (1959) 2 M.L.J. 308 : (1959) M.L.J. (Cr.) 737 : I.L.R. (1959) Mad. 850.

subject to such exceptions, if any, as may be made by or under the order, the import export, carriage coastwise or shipment as ship stores of goods of any specified description. Thus could be done by means of order published in the official gazette. The Act also made by section 5 any contravention of any order made and deemed to have been made under the Act punishable and by section 6 provided for cognizance of offences against the provisions of the Act.

In pursuance of the power granted to the Central Government, the Imports Control Order was issued on 7th December, 1955 (hereinafter referred to as the Order). This Order repealed the earlier orders issued under the Act or the Defence of India Rules 1939. It provided for a system of licensing and Rule 3 thereof provided that no person shall import any goods of the description specified in Schedule I, except under and in accordance with a licence or a customs clearance permit granted by the Central Government or by any officer specified in Schedule II. Form of application for licences and fees payable therefor are provided in Rule 4 and Rule 5 provides for conditions to be imposed on a licensee at the time of granting licences. Rule 6 gave power to the Central Government or the Chief Controller to refuse to grant a licence or direct any licensing authority not to grant licence for certain reasons. One of the reasons for such refusal was if the application for import licence was defective, and did not conform to the prescribed rules. Rule 7 provided for amendment of licences and Rule 8 gave power to the Central Government or the Chief Controller to suspend the issue of licences or debar a licensee from using a licence for certain reasons. Rule 9 provided for cancellation of licences by the Central Government or any other officer authorised in this behalf. The power under Rules 7, 8 and 9 was to be exercised after giving a reasonable opportunity of being heard to the licensees.

These are the statutory provisions under the Act and the Rules for granting licences. In order however to guide the licensing authorities in the matter of granting import licences the Central Government issued certain administrative instructions to be followed by the licensing authorities. These instructions provided for grant of import licences to three kinds of persons—(i) established importers, (ii) actual users and (iii) new comers (see the Red Book of Rules and Procedure for Import Trade Control for the period January—June, 1957). We are in the present appeals concerned with established importers and may briefly indicate how established importers were dealt with in the Red Book concerned. "Established importers" were defined as persons or firms who had been actually engaged in import trade of the articles comprised in the Schedule during at least one financial year falling within the basic period. The basic period out of which the established importer could select the best year for the purpose of calculating the quota was from 1st April, 1945 to 31st March, 1952. Procedure was provided in these instructions for applications and for establishment or refixation of quotas (see Section 1 of the Red Book for the period January—June, 1957, Instruction 22).

After setting out the system of granting quotas to established importers on the basis of their past imports, Instruction 71 with which we are particularly concerned, laid down that quotas were granted on the pre supposition that no change had taken place in the constitution of the firm. The expression 'firm' included a partnership, a limited company and a proprietary business. It was further provided that when a change occurred in the constitution or the name of a firm or the business changed hands, the reconstituted firm would not be entitled to the quota of the original firm until the transfer of the quota rights in their favour had been approved by the Chief Controller or other licensing authority, as the case may be. Instruction 71 also provided how the transfer of quota rights would be recognised or approved. In the present case we are concerned with clause (b) of Instruction 71, which is in these terms.—

Where a firm is dissolved and the partners agree to divide its business assets and liabilities and its goodwill is taken over by one of the partners or none of them is allowed to use it the partners shall get their respective share in the quota rights according to the provision of the agreement."

Instruction 72 provided for documentary evidence to be produced by the applicants in support of their case for transfer of quotas.

It will be seen that these administrative instructions do not create any right as such in favour of persons with whom they deal. They are for guidance of the authorities in the matter of granting quotas for the purpose of the Order. That is why when clause (b) of Instruction 71 provides for division of quota rights it lays down that the partners shall get their respective share in the quota rights according to the provision of the agreement between them. Once the Chief Controller is satisfied, on the evidence produced before him that the firm had certain quota rights and had been dissolved, he has to divide the quota rights between partners in accordance with the provisions of the agreement between them. As we read clause (b), it is clear that where the conditions contained in Instruction 71 are fulfilled, the Chief Controller must divide the quota rights in accordance with the provisions of the agreement between the partners of the firm that has been dissolved. Clearly therefore these administrative instructions provide a machinery for division of quota rights in certain cases including the dissolution of a firm consisting of a number of partners and all that the Chief Controller has to do is to satisfy himself that there has been a dissolution in accordance with the provisions in clause (b) and thereafter he is bound to accord approval to the division of quota rights according to the provision of the agreement between the partners. He cannot refuse to divide the quota rights between the partners of a dissolved firm where he is satisfied on the evidence produced before him that the conditions contained in clause (b) have been satisfied. The function of the Chief Controller under Instruction 71 read with Instruction 72 appears more or less of a ministerial nature and he is bound to divide the quota rights in accordance with the provisions of the agreement between the partners of a dissolved firm, once he is satisfied on the evidence produced before him of such dissolution and the agreement leading to dissolution provides for the division of quota rights. The division of quota rights according to the instructions is merely for the purpose of helping the licensing authority under the Order in the matter of grant of licence to the class of established importers with which this division is concerned. The approval of the Chief Controller is provided by these instructions in order that the licensing authorities may have a clear guidance as to how they should deal with the quota allotted to a firm consisting of a number of partners which has been dissolved. It is in the background of this position that we have to consider whether this approval granted by the Chief Controller relates back to the date of the agreement relating to the dissolution of the firm consisting of a number of partners.

Two views have been expressed by the High Courts in this behalf. The Madras High Court took the view in *Jain's case*¹ that

"where a firm is dissolved and the partners agree to divide the business assets and liabilities, the partners shall get their respective share in the quota rights according to the terms of the agreement. Such rights would accrue to each of the partners from the date of the agreement."

The Madras High Court further held that even where the approval of the Chief Controller is made after the licensing period for which application has been made is over, the approval dated back to the time when the firm was dissolved and the agreement to divide the quota rights was made. The licensing authority therefore according to this view has to deal with the application for licence on the basis that the approved quotas were given to the partners of the dissolved firm from the date of the agreement and cannot refuse the licence only on the ground that the approval was granted after the import period had expired.

The other view is taken by the Bombay High Court in *Jagannath v. Varadhar*². It was held in that case that the transfer of quota rights was a condition precedent to the grant of an import licence. The person in whose favour such a transfer had

¹ 1. (1959) 2 M.L.J. 308 : (1959) M.L.J. (Cri.) 737 : I.L.R. (1959) Mad. 850. 2. A.I.R. 1961 Bom. 244.

been recognised or sanctioned was consequently entitled to rely upon that transfer for a period subsequent to such sanction or recognition and not for any anterior period, even though the application for licence might have been made in proper time before the import period expired

We have given the matter careful consideration and are of opinion that the view taken by the Madras High Court is correct. We have already pointed out that on a proper interpretation of Instruction 71, there is no doubt that the Chief Controller is bound to divide the quota of a firm consisting of partners which has been dissolved in accordance with the provisions of the agreement between the partners provided the necessary evidence has been produced before him as required by Instruction 72 in that behalf. Such being the nature of the proceeding before the Chief Controller it follows that when he gives approval to the division of the quota between the partners of a dissolved firm in accordance with the agreement between them, the approval must take effect from the date of the agreement between the partners. It might have been a different matter if the Chief Controller had the power to refuse division of the quota rights under these instructions, but he has no such power and must divide the quota in accordance with the agreement if he is satisfied as to the dissolution on the evidence produced in accordance with Instruction 72. If such approval by the Chief Controller were not to date back to the date of agreement it would mean that the partners who were otherwise entitled to approval under Instructions 71 and 72 might lose the advantage that they would have before the licensing authority by delay in the approval by the Chief Controller. In this connection our attention was drawn to the opening words in Instruction 71 which provided that 'the reconstituted firm will not be entitled to the quotas of the original firm until the transfer of the quota rights in their favour has been approved by the Chief Controller'. It is true that these words make it necessary that they should be approval of the Chief Controller before a partner of a dissolved firm can say that he holds a quota. But these words do not mean that such approval will not date back to the date of agreement dividing the quota rights, for the Chief Controller, as already indicated, has to divide the quota rights once he is satisfied as to dissolution on the production of evidence mentioned in Instruction 72. In such circumstances it would in our opinion be fair to hold that the Chief Controller's approval dates back to the date of agreement so that such persons may not suffer on account of the delay in the Chief Controller's office in the matter of according approval.

The fact that in his letter of approval the Chief Controller usually says that the quota rights admissible to the dissolved partnership should in future be divided between the partners would not necessarily mean that the quotas for the partners were to take effect only after the date of approval. If the division of quota has to be recognised by the Chief Controller on production of evidence required by Instruction 72 and this division has to be in accordance with the agreement between the partners of a dissolved firm, the approval must relate back to the date of agreement, for it is the agreement that is being recognised by the Chief Controller. In such a case the fact that the Chief Controller says that in future the quota would be divided, only means that the original quota of the undissolved firm would from the date of the agreement of dissolution be divided between partners as provided thereunder.

Further we should like to make it clear that quotas should not be confused with licences. Quotas are merely for the purpose of informing the licensing authority that a particular person has been recognised as an established importer for import of certain things. Thereafter it is for the licensing authority to issue a licence to the quota holder in accordance with the licensing policy for the half year with which the licence deals. For example, if in a particular half year there is an order of the Central Government prohibiting the import of certain goods which are within the quota rights, the licensing authority would be entitled to refuse the issue of licence for import of such goods whose import has been banned by the Central Government.

under the Act by notified order. Thus the approval of the Chief Controller under Instruction 71 is a mere recognition of the division made by the partners of a dissolved firm by agreement between themselves and in that view the recognition must clearly relate back to the date of the agreement. Further when the Chief Controller says in his letter that *in future* the division would be recognised in a certain ratio based on the agreement, it only means that the Chief Controller has approved of the division made of the parties and such approval then must relate back to the date of the agreement between the parties. We therefore hold that the view taken by the Madras High Court that the approval by the Chief Controller relates back to the date of agreement is correct.

It was next urged that the application when it was made to the Joint Chief Controller was not complete inasmuch as it did not mention what quota the particular partner had. That is undoubtedly so, for the applications in the present cases stated that the firm had been dissolved and application had been made to the Chief Controller for division of the quota of the original firm between the partners according to the agreement between them. To that extent the application was defective. It is pointed out that under Instruction 13 application for licence has to be made before a certain date and has to be complete in all respects. It was further urged that it is always open to the Joint Chief Controller to reject an application which is defective and is thus incomplete. Assuming that is so, one should have expected such a defective application being dismissed immediately after the last date for making the application had expired and the Joint Chief Controller should have given that as the reason for the rejection of the application for licence. But this was not done in the present cases and the reasons for rejection of the application was not that it was not complete when made. Further it appears that it is not unusual for licences to be granted after the import period is over. It is also not denied that it was open to the Chief Controller in his discretion to say that the division of quota rights would be recognised from the date of the agreement even though the approval came much later. If that is so, it would mean that the applicant for division of quota would be entirely at the mercy of the Chief Controller because there is nothing in the Red Book to show under what circumstances the Chief Controller can grant recognition from the date of the agreement even though the approval comes much later. On the whole therefore we are of opinion that the view taken by the Madras High Court is correct as the grant of approval in accordance with the agreement is obligatory on the Chief Controller if the evidence required under Instruction 72 has been produced to his satisfaction.

The last point urged was that subsequent to October, 1957, Government of India changed its policy with respect to import of fountain pens with which some of the present appeals are concerned. This it was urged amounted to a ban on the import of fountain pens and it would not be open to the Joint Chief Controller to issue any licence for any period, be it January—June, 1957, after the import of fountain pens had been banned from October, 1957. Now there is no doubt that it is open to the Central Government under section 3 to prohibit the import of any article but that can only be done by an order published in the official gazette by the Central Government under section 3. The High Court has found that no such order under section 3 of the Act has been published. Nor has any such order by the Central Government been brought to our notice. All that has been said is that in the declaration of policy as to import, the word “nil” appears against fountain pens. That necessarily does not amount to prohibition of import of fountain pens unless there is an order of the Central Government to that effect published in the official gazette. We therefore agree with the High Court that unless such an order is produced it would be open to the licensing authority to issue a licence for the period of January—June, 1957 even after 1st October, 1957.

The appeals therefore fail and are hereby dismissed with costs. There will be one set of hearing fee.

Mudholkar, J.—A common question of law arises for decision in these appeals. The essential facts bearing on this question being more or less similar it would be

sufficient to state those which give rise to Civil Appeal No 60 of 1965. A partnership firm styled as Nainmull Juthmull carried on, amongst other things, the business of importing goods from foreign countries. As an established importer, the Joint Chief Controller of Imports and Exports, Madras had granted it a quota for import of certain commodities. On the strength of this the firm used to be granted import licences every half year. There were three partners in that firm, namely, Amunchand Mutha, Naimull Nathmull and Juthmull Mutha. On 1st January, 1957, the firm was dissolved. On 25th March, 1957, Amunchand Mutha made an application to the appropriate authority for the grant of an import licence in respect of the period January—June, 1957, stating in his application the facts that the firm Nainmull Juthmull held a quota certificate, that the firm was dissolved and that an application was made to the Chief Controller of Imports for the division of the quota amongst the erstwhile partners of the firm. That application had in fact been made on 4th March, 1957, and was pending on the date on which an import licence was applied for by Amunchand to the Joint Chief Controller of Imports and Exports at Madras. On 8th April, 1957, the latter informed Amunchand that before a licence would be granted to him he should get the approval of the Chief Controller for the division of quota rights of the dissolved firm. For certain reasons which are not material for the purpose of the appeal there was delay in the disposal of the aforesaid application. In September, 1957, the Chief Controller informed Amunchand that instructions would be issued to the Licensing Authority to the effect that quota certificates admissible to the dissolved firm should in future be divided between the three partners in certain proportions. Amunchand thereupon approached the Joint Chief Controller for grant of a licence and on 9th January, 1958, the latter informed him that no licence could be issued to him for the period January—June, 1957 since the division of quota rights of the firm was recognised by the Chief Controller only after the expiry of the licensing period to which the application related. Amunchand then preferred an appeal from the decision of the Joint Chief Controller but failed. Thereupon he moved a writ petition in the High Court of Madras for the issue of a writ of *mandamus* or any other appropriate writ to the Joint Chief Controller for the issue of an import licence to him for the period January—June, 1957. The High Court following its earlier decision in the *Joint Chief Controller v H V Jain*¹, granted the application. It is against this decision of the High Court that the Joint Chief Controller has come up in appeal before this Court as also against similar decisions in the other connected appeals.

The point which is urged on behalf of the respondents in these appeals is that the Joint Chief Controller is bound to grant an import licence for the period for which it was sought even though the division of quota rights was approved by the Chief Controller subsequent to the expiry of the licensing period provided that the application for the grant of the licence was made within time and an application for division of quota rights is made before the expiry of the licensing period. The contention of Mr Viswanatha Sastri who appears for all these respondents is that in such cases the approval of the Chief Controller of the division of quota rights even though accorded after the expiry of the licensing period would relate back to the date of dissolution of the firm or at any rate to the date of the application for approval.

It would be appropriate to advert now to the legal position pertaining to the import of foreign goods. In the first place there is the Imports and Exports (Control) Act, 1947. Sub-section (1) of section 3 of that Act amongst other things, provides that the Central Government may by order published in the Gazette prohibit, restrict or otherwise control in all cases or in specified classes of cases and subject to such exceptions, if any, as may be made by or under the order "(a) the import of goods of any specified description". Sub-section (2) makes the provisions of section 19, Sea Customs Act applicable to goods with respect to which any order under sub-section (1) of section 3 of the Imports and Exports (Control) Act, 1947 has been made. Sub-section (3) of that section provides as follows

"Notwithstanding anything contained in the aforesaid Act, the Central Government may, by order published in the Official Gazette, prohibit, restrict or impose conditions on the clearance, whether for home consumption or for shipment abroad of any goods or class of goods imported into the Provinces of India."

Section 5 provides for certain penalties for contravention of any order made or deemed to have been made under the Act. In exercise of the powers, conferred by section 3 the Government of India promulgated on 7th December, 1955, an Order for the control of import trade. Clause (3) thereof runs thus :

"*Restriction on import of certain goods.*—Save as otherwise provided in this order, no person shall import any goods of the description specified in Schedule I, except under, and in accordance with a licence or a customs clearance permit granted by the Central Government or by any officer specified in Schedule II."

Clause (4) (1) provides for making an application for grant of a licence to import. Clause (5) provides for attaching conditions to a licence issued under the Order. Clause (6) confers power on the Government of India or the Chief Controller of Imports and Exports to refuse to grant a licence for any of the reasons specified in that clause. Clause (8) empowers these authorities to suspend the issue of licences or debar a licensee from receiving licences and clause (9) provides for cancellation of licences. The grounds on which action can be taken under either of these clauses are also specified in them. It is not necessary to refer to the other clauses of this Order. Appended to the Order are Schedules contemplated by clause (3) of the Order. Amongst the grounds for refusal of licence under clause (6) the following are relevant for the purpose of deciding the point which arises before us :

"(a) if the application for a licence does not conform to any provision of this Order ;

* * * * *

(c) if the application for an import licence is defective and does not conform to the prescribed rules ;

* * * * *

(g) if the applicant is not eligible for a licence in accordance with the Import Trade Control Regulation."

Reading the Act and the Import Control Order together it would follow that no person is entitled to import into India goods or commodities included in Schedule I of the Order except in accordance with the provisions of the Act and of an Order promulgated thereunder by the Government of India or as permitted by that Order. The Import Control Order, save in cases falling within clause (11) of that Order prohibits the import of any commodity set out in Schedule I except under a licence issued under the Order. The granting of licences for import of commodities into India and the allotment of the requisite foreign exchange for the purpose is regulated by the policy framed in that behalf from time to time by the Government of India. The commodities sought to be imported by each of the respondents are those included in Schedule I and could be imported only under a licence. Each of them claims to be an established importer in the sense that he is entitled to a proportionate quota which had been allotted to the dissolved firm of which he was a member.

The principles to be borne in mind while dealing with applications for licence for import are set out in what is known as "Red Book" which is issued by the Government from time to time with respect to each licensing period. The title of the book is "Import Trade Control Policy." The procedure to be followed by the authority while dealing with applications for import licences is given not only in this book but also in what is called the "Hand-book." The Red Book in addition to the instructions, also contains the "Policy Statement" which gives details of licensing policy for the particular licensing period dealt with in that book. The instructions divide the intending importers into four broad categories (a) established importer ; (b) actual users ; (c) newcomers and (d) others who do not come in any of the above categories (see para 22 of the Hand-book). The share available to the applicants in these categories is fixed from time to time. We are here concerned with category (a), that is, with established importers. If a person or a firm is recognised as an established importer certain quota of imports is made available

to that person or firm for the particular licensing period from out of the share in imports allotted to established importers. The expression "firm" used in the instructions is a wide one and includes a partnership, a limited company or a proprietary business. The business of an exporter of a dissolved firm would thus fall within the definition. Paragraph 71 of the Red Book provides that where a change occurs in the constitution or the name of a firm or the business changes hands the reconstituted firm will not be entitled to the quotas of the original firm *until the transfer of the quota rights in their favour has been approved by the Chief Controller of Imports and Exports*. Sub para (a) of Paragraph 71 deals with transfer of quota rights. With this sub paragraph we are not concerned. Sub paragraph (b) dealt with division of quota rights and reads thus

' (b) *Division of Quota Rights*—Where a firm is dissolved and the partners agree to divide its business assets and liabilities and its goodwill is taken over by one of the partners or none of them is allowed to use it the partners shall get their respective share in the quota rights according to the provision of the agreement

In these appeals we are concerned only with cases which fall under this sub paragraph. Consideration of all the provisions of the Act and the Order along with the instructions leaves no doubt that no person has a right to import a foreign commodity into India the import of which is prohibited. Where however, the ban on import of foreign goods is permitted to be lifted in favour of a person who has obtained a licence for import under the Order he can make an application for grant of a licence. But even then he must comply fully with the requirements specified in the Control Order and make the application in the prescribed form. The instructions contained in the Hand book and the Red Book including those in Paragraph 71 are meant for the guidance of the Licensing Authority and cannot be put higher than administrative instructions. It would follow, therefore that such instructions would not confer a legal right upon an exporter for the division of the quota rights of a dissolved firm and for treating him as an established importer though strictly speaking he was not one. Once this position is reached there would be no difficulty in answering the question which we are called upon to decide. Further, even though a firm is an established importer it cannot be said to possess a legal right to import according to its quota. If the firm itself had no legal right to import according to its quota there is no room for saying that upon its dissolution each of its erstwhile members would acquire a right to import either in proportion to their respective shares in the firm or in the proportion provided for in the agreement whereunder the dissolution was effected or be entitled to be treated as an established importer. The Government however, with a view to ensure a fair administration of the licensing system has given instructions in Paragraph 71 of the Red Book to certain authorities to divide the quota rights of the dissolved firm in the manner provided in sub para (b). The failure of the authority concerned to abide by these instructions may conceivably draw upon that authority certain consequences but would not confer any justiciable right upon any member of the erstwhile firm. The action of the authority concerned could be rectified in an appeal to a superior authority. Where, however, it is not so rectified the claimant to the quota right has no remedy at law. However, in none of the cases before us has there been an arbitrary or unfair refusal to apply the instructions contained in sub para (b).

Now, what has happened here is that though the applications for licences were made for a specified period within the time allowed they were rejected and the applicants were informed by the licensing authority that the division of quota rights would be given effect to only for future periods inasmuch as the divisions were recognised by the appropriate authority after the expiry of the particular periods to which the applications for import licences related. As rightly pointed out by my brother Wanchoo a quota right is not something which is transferable or heritable at law. It would follow therefore that recognition of a division of quota rights and thus treating him as an established importer, though he was not one, is no more than a concession given by the appropriate authority in pursuance of administrative instructions. Where, therefore, the recognition of a division of quota rights is accorded by the Chief Controller of Imports and Exports, as was done in these

cases, only in respect of future imports, the erstwhile partner has no right to seek redress from a Court or even the High Court under Article 226 of the Constitution. His position would be no better if upon that ground the licensing authority refused to grant a licence for a licensing period antecedent to the recognition of the division of quota rights. The reason is that for an application for grant of a licence to be a proper application it must conform to the form prescribed in that behalf and that where it does not do so it is liable to be rejected. The power conferred by clauses (a) (e) and (g) of the Control Order is available to the Licensing Authority for this purpose. Here it is said that the respondent's application was defective because it does not conform to rules. It is not disputed that the application was made in Form A of Appendix IV which is a form for application by an established importer. This form is reproduced at page 319 of the Red Book for the period January-June, 1957. Item 8 of that form requires "General Information to be furnished". Sub-item 'h' is as follows :

"Whether the constitution of the firm has undergone any change after the issue of the quota certificate to the firm? If so, quota No. and date of orders issued by the appropriate authority sanctioning transfer of quota rights in favour of the applicant."

This clearly shows that an application as an established importer can be made by a firm or person claiming the whole or a part of the quota only after the appropriate authority has sanctioned transfer of quota rights. For, the information required by this sub-para. to be furnished cannot possibly be furnished till the recognition of the division is accorded by the Chief Controller of Imports and Exports. The consequence that would ensue, if an application is made for grant of a licence without furnishing the information required by this sub-para. is that application would have to be treated as defective and would therefore, be liable to be rejected under clause (6) of the Control Order. Here, on the respondent's own showing the appropriate authority had not recognised the division of the dissolved firm's quota rights by the date on which he made an application for grant of an import licence for the period January to June, 1957. He could thus claim to have been an established importer though he purported to apply for a licence upon the basis that he was one. I, therefore, hold that the Joint Chief Controller's action in refusing to grant a licence for that period was well within his powers. It is said that in some other similar cases licences were issued by that authority. That may or may not be a fact; but even if it is fact it is not relevant for the purpose of determining whether the action of the authority was lawful or not. For the respondent's petition is not based upon the ground that he has been unfairly discriminated against.

It is, however, said that the recognition of the division must relate back to the date of the mutual dissolution of the firm or at least to the date of the application to the Chief Controller for recognition of the division. A similar argument was advanced before a Bench of the Bombay High Court of which I was a member in *Jagannath Prabhashankar Joshi v. Varadkar*¹, and in rejecting it I observed as follows:

"There is one more thing which we would like to point out and that is that an application for the grant of an import licence to a firm, which has undergone a change in its constitution, could be made only after the sanction regarding transfer of the quota rights is issued in its favour. That is what it is provided in paragraph 13. Therefore, the application made by the petitioners to the first respondent on the 27th of December, 1957, cannot be regarded as a proper application at all. This is made clear in the Form itself which amongst other things requires the following to be answered :

"Whether the constitution of the firm has undergone any change after the issue of the quota certificate to the firm? If so, quota No. and date of orders issued by the appropriate authority sanctioning transfer of quota rights in favour of the applicant."

It is clear from this position that unless the quota certificate in favour of the reconstituted firm is sanctioned by the Chief Controller of Imports and Exports, that firm would not be entitled to obtain an import licence on the ground of its being an established importer and a grantee of a quota certificate."

The decision to the contrary in *Jain's case*², was also cited in *Jagannath's case*¹, and in particular the following observations therein :

1. (1960) 63 Bom. L.R. 1.

2. (1959) 2 M.L.J. 308 : (1959) M.L.J. (Cri.)

737 : I.L.R. (1959) Mad. 850.

"We are in entire agreement with this reasoning. Sub-clause (b) of paragraph 74 is quite clear that where a firm is dissolved and the partners agree to divide its business assets and liabilities the partners shall get their respective share in the quota rights according to the provisions of the agreement. Such rights would accrue to each of the partners from the date of the agreement. The fact that approval of the agreement (assuming such approval is necessary) is given by the Chief Controller of Imports and Exports on a later date, it cannot be said that the rights of the partners would accrue only on and from the date of such approval. The words 'in future' can be understood to mean 'from the date of the dissolution'."

Dealing with them I observed as follows

"With respect, we cannot accept the view taken by the learned Chief Justice and concurred in by the learned Judge. In so far as quota rights are concerned Chagla C.J. in an unreported judgment dated 17th March, 1967 in *Chumanlal Popatlal v B M Chaksey*¹ observed as follows

"But this quota has no market value, it is not ordinarily transferable or assignable. It is merely a licence or a permit given to a particular party to enable him to import paper into India and as such it has no inherent value."

Thus according to this Court a quota right is not a 'property' which is transferable in law. If that view is correct—and with respect we think it is—it follows that by reason of the dissolution of the partnership no transfer takes place with respect to quota rights. It is true that the Import and Export Authorities are required to take into account a transfer of quota rights but that is so because of the instructions specifically issued in this regard by the Central Government and which are to be found in the book entitled 'Import Trade Control Policy'. These rights such as they are must be said to be a creation of the Government notifications and would necessarily be exercisable to the extent and in the manner provided in those notifications. In paragraph 72 of the 'Import Trade Control Policy' Book it is clearly laid down that when a change occurs in the constitution of a firm the re-constituted firm will not be entitled to the quotas of the original firm until the transfer of the quota rights in their favour has been approved by the Chief Controller of Imports and Exports. It therefore follows that this transfer is a condition precedent to the grant of an import licence. The person in whose favour such a transfer has been recognised or sanctioned, would consequently be entitled to rely upon that transfer only for a period subsequent to such sanction or recognition and not for any anterior period. The date of dissolution of the old firm has thus no relevance whatsoever in so far as the grant of an import licence is concerned. An import licence is granted by the Joint Chief Controller of Imports and Exports to a person not because he has acquired the rights of a dissolved partnership firm but because the transfer of the quota right made in his favour is recognised by the Chief Controller of Imports and Exports. We therefore, agree with the learned single Judge that the transfer sanctioned by the second respondent could not entitle the petitioners to obtain an import licence in respect of a period prior to the grant of the sanction."

I still maintain the view that I took. I would, however, add that by saying 'the rights such as they are', what I meant was that even if the transfer be said to confer rights, the rights themselves being the creation of the instructions contained in para 72 of the Red Book (corresponding to para 71 of the Red Book for January-June, 1957) would arise only upon strict compliance with the instructions. It is true that here there is no transfer by the firm of its quota rights but upon its dissolution there was a division of its quota rights by the erstwhile partners amongst themselves. Under sub para (a) (iii) of para 71 no one would be entitled to the firms' quota but under sub para (b) the quota would be distributed amongst the partners according to the provision in that behalf in the agreement of dissolution. The case being one of the business of the firm changing hands as contemplated by the opening words of para 71 the approval of the Chief Controller of Imports and Exports to the division of quota rights was imperative. This position has also not been challenged by Mr. Viswánatha Sastri.

In support of the contention that the approval of the Chief Controller of Imports and Exports would relate back to the date of dissolution it was contended that since the Chief Controller of Imports and Exports had no right to refuse to recognise a transfer (or the division of quota rights) the rights of the transferee would accrue to him as from the date of the transfer. I cannot accede to the proposition that in no circumstances can the Chief Controller of Imports and Exports refuse to recognise a transfer. Indeed, in *Jagannath's case*², such recognition was refused on the ground that the requirements of the instructions had not been carried out. It was

only after the parties concerned carried them out by the subsequent execution of a proper document that the transfer was recognised. There might conceivably be other cases in which recognition of transfer or division of quota rights could be properly refused. The argument is, therefore, on its very face clearly untenable.

To sum up, the position is this. The respondent made an application for grant of licence to import a commodity included in Schedule I to the Control Order upon a form meant to be used by an established importer. On the date of the application he was not an established importer and was, therefore, incompetent to apply for an import licence upon the basis that he was an established importer. No doubt, he was a member of a firm which was an established importer and held a quota right for import of commodities included in Schedule I. No application was made by or on behalf of that firm because that firm had been dissolved before the respondents made an application for grant of import licence. The right to a quota is not a legal right and it is only in pursuance of certain administrative instructions that the Licensing Authority allots quotas to established importers. In pursuance of these instructions the Chief Controller of Imports and Exports is empowered to recognise the division of quota allotted to a firm which has been dissolved amongst the members of that firm. They do not, however, create any legal right in favour of the erstwhile partners to a share in the quota of the dissolved firm. The instructions, no doubt, provide that the division is to be recognised by the Chief Controller only for the future. The plain meaning of this is that the division is to be made effective only from a date subsequent to the approval of the division by the Chief Controller. Even assuming that these instructions confer some kind of right upon the partners of a dissolved firm it can be exercised only in the manner and to the extent provided in the instructions themselves. Not only that the instructions do not provide for any relation back of the recognition of division by the Chief Controller of Imports and Exports to the date of dissolution of the firm but they clearly provide for the recognition of the division only in future. That being the position the application made by a person on a form meant for established importers must be deemed to be a defective one if on the date on which he made it his rights in the quota had not been recognised and he was not an established importer. The subsequent recognition of his share in the quota does not validate the application.

In the result I would allow the appeals, set aside the judgment of the High Court and dismiss the writ petition with costs in all the Courts. There will be only one hearing fee in all these appeals.

ORDER OF THE COURT : In accordance with the opinion of the majority the appeals are dismissed with costs. One set of hearing fee.

K.S.

Appeals dismissed:

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—A.K. SARKAH, *Chief Justice* M. HIDAYATULLAH, J. R. MUDHOLKAR, R. S. BACHAWAT AND J. M. SHELAT, JJ.

The Barium Chemicals Ltd., and another

.. *Appellants**

v.

The Company Law Board and others

.. *Respondents.*

Companies Act (I of 1956), sections 10-E, 237, 637 and 642—Investigation—Powers delegated by Central Government to Company Law Board—Order if can be made by the Chairman—Basis, extraneous material—Validity—Jurisdiction of Court—Provisions empowering, if offend Articles 14 and 19 (1) (g) of the Constitution.

Company Law Board (Procedure) Rules (1964), rule 3.

On 19th May, 1965, the Secretary of the Company Law Board issued an order on behalf of the Board under section 237 (b) of the Companies Act (I of 1956) appointing 4 persons as Inspectors to investigate the affairs of the first appellant company since its incorporation in 1961. The order was

* C.A. No. 381 of 1966.

made by the Chairman of the Board on behalf of the Board by virtue of rule 3 of the Company Law Board (Procedure), Rules 1964. The company and its managing director filed a petition in the High Court of Punjab, under Article 226 of the Constitution of India for a writ of *mandamus* or other writ or direct or on order quashing the order of the Chairman aforesaid and also prayed for ancillary reliefs.

The grounds of objection of the petitioners were —

- (1) The order was *mala fide*, made at the instance of the then Finance Minister
- (2) The Board in making the order has acted on material extraneous to the matters mentioned in section 237 (b)
- (3) The order having been in fact made at the instance of shareholders is invalid and on a true construction of section 237 (b) it could not be done
- (4) The order made by the Chairman and not by the Board is invalid
- (5) The provisions of section 237 (b) are void as offending Articles 14 and 19 (1) (g) of the Constitution

The respondent Board denied the allegation of *mala fides*, pleaded there were ample materials before the Board—not placed before the Court—justifying action under section 237 (b) on a consideration whereof the chairman made the impugned order and stated that on an "examination it appeared (i) that there had been delay, bungling faulty planning of the project resulting in double expenditure, (ii) since its floatation the company had been continuously showing losses and a third of its capital has been wiped off, (iii) that the shares of the company which to start with were at a premium were being quoted on the Stock Exchange at half the face value (iv) some eminent persons who were directors had subsequently severed their connections due to differences with the second petitioner on account of the manner in which the affairs of the company were being conducted."

The High Court rejected the contentions of the appellants and dismissed the petition. Hence the instant appeal to the Supreme Court by Special Leave.

In the appeal the appellants raised the following points —

- (1) The impugned order was made *mala fide* and the High Court erred in holding that the Board was an independent authority and that it was its chairman who formed the opinion *requis* it and passed the order and therefore the *malice* of the second respondent was irrelevant, the High Court had also erred in rejecting the applications for production of documents and for cross-examination of the second respondent, (2) even on the basis that the circumstances have been found by the first respondent, they were extraneous to section 237 (b) and so the order was *ultra vires* the section, (3) the order passed by the Chairman and not the Board was bad, (4) the section itself was bad as offending against Articles 14 and 19 (1) (g) of the Constitution

Held, on the materials placed before the Court and on facts, the contention that the impugned order by the Chairman of the Board was *mala fide*, (1) passed at the instance of the second respondent fails. An allegation as to bad faith or indirect motive cannot be held established except on clear proof thereof.

In view of the allegations in the affidavit based on 'reasons to believe' and the sources of information not being disclosed, and the assertion in the affidavits of the respondents 1 and 7 that the order was made by the first respondent independently, the High Court was perfectly right in not ordering the petition for the production of documents or permitting the cross-examination of respondents 1 and 2.

Per Mudholkar, J (for himself and Sarkar, C J) — In a proceeding under Article 226 it is within the discretion of High Court not to allow a deponent to be cross-examined and the Supreme Court while hearing an appeal by Special Leave will not interfere lightly with that discretion.

Per Hidayatullah, Bachawat and Shrilal, JJ (Sarkar, C J and Mudholkar, J contra) — The circumstances set out in paragraph 14 of the affidavit of the first respondent are the conclusions of the first respondent on an examination of all the materials before him and they do not and cannot reasonably support the opinion that they suggest an intent to defraud or fraudulent conduct or any other of the matters set out in section 237 (b). Hence the order is *ultra vires* that section.

Even if an order is made by an Authority in good faith in exercise of the power under a statute, since the authority has to accord with and act within the limits of the legislation, its order can be challenged if it is beyond the limits or if passed on extraneous grounds or if there are no grounds or if the grounds are such that no one can reasonably arrive at the opinion requisite under the legislation. In the case of any of the above situations it has to be held the authority did not apply its mind or could not honestly form that opinion.

The subjective process cannot extend to the existence of circumstances also. 'In the opinion of' is not always to be construed as an altogether subjective process not lending even to a limited scrutiny whether it was formed on relevant facts or within the limits set. It does not mean that where the 'circumstances suggesting' do not exist the Board can still say 'in its opinion they exist'. The expression 'circumstances suggesting' in the section only means that the circumstances need not conclusively establish an intent to defraud *etc.* There must therefore exist circumstances which in the opinion of the authority suggest the matters set out in section 237 (b).

Per Hidayatullah, J.—The matters set out in section 237 (b) limit the jurisdiction of the Board. The discretion vested in the Board thereunder does not extend to a fishing expedition to find evidence of those matters.

Per Mudholkar, J. (for himself and *Sarkar, C.J.*)—The discretion conferred under section 237 (b) is administrative and not judicial. The scope of judicial review is limited.

The matters mentioned in paragraph 14 of the affidavit of the first respondent are only conclusions and not all the materials which he had before him.

Even if they are the only grounds it would not be far fetched to say that they could reasonably suggest to the Board that they were not careless happenings but the deliberate actions of the second appellant done with ulterior motives of earning profit for himself.

Per Bachawat, J. and Mudholkar, J. (for himself and *Sarkar, C.J.*) (*Hidayatullah and Shelat, JJ.*, contra).—The order made under section 237 (b) is not invalid because it was made by the Chairman alone and not by the Board. There is a limit to the rule against sub-delegation. Rule 3 of the Company Law Board (Procedure) Rules, 1964 framed under section 642 read with section 10-E (5) enable the Chairman to distribute the work of the Board among its members subject to the approval of the Central Government (which was authorised to delegate its powers to the Board as also to make Rules of Procedure). The Chairman has allotted matters under sections 235 and 237 to himself singly and the order was not without jurisdiction. Sub-clause (4-A) of section 10-E also permits the distribution of the work.

Per Hidayatullah and Shelat, JJ. (dissenting).—There is sharp cleavage between power and procedure. Sub-clause (4-A) of section 10-F is not retrospective; it was added because there was a lacuna. The constitution of different benches of the Board was absent at the relevant time (prior to the insertion of sub-clause (4-A)). Rule 3 of the Rules authorising the Chairman to distribute the powers is not procedure but a sub-delegation of the powers of the Board delegated by the Government. Rule 3 and the order of 6th April, 1964, of the Chairman taking powers to himself are incompetent and invalid. The order by the Chairman alone is invalid.

By Court.—Section 237 (b) did not contravene the provisions of Article 14 of the Constitution. The section did not also violate Article 19 (1) (g) in that it was only exploratory and that it did not affect the business carried on by the appellants.

Per Hidayatullah, Bachawat and Shelat, JJ.—Further, even if it is regarded as a restriction placed in the carrying on of business, it might be said it is protected under Article 19 (6).

Appeal by Special Leave from the Judgment and Order dated the 7th October, 1965, of the Punjab High Court (Circuit Bench) at Delhi in Civil Writ No. 1626-C of 1965.

M.C. Setalvad, Senior Advocate (*R. K. Garg* and *S. C. Agarwala*, Advocates of *M/s. Ramamurthi & Co.*, with him), for Appellants.

C.K. Daphtary, Attorney-General for India and *B.R.L. Jyengar*, Senior Advocate (*R.K.P. Shankar Das* and *R. H. Dhebar*, Advocates, with them), for Respondents Nos. 1 and 3 to 7.

S. Mohan Kumaramangalam, Senior Advocate (*C. Ramakrishna* and *A.V.V. Nair*, Advocates, with him), for Respondent No. 2.

The Court delivered the following Judgments :

Mudholkar, J. (for *Sarkar, C.J.* and himself)—On 19th May, 1965, *D. S. Dang*, Secretary of the Company Law Board issued an order on behalf of the Company Law Board made under section 237 (b) of the Companies Act, 1956 appointing 4 persons as Inspectors for investigating the affairs of the Barium Chemicals Ltd., appellant No. 1 before us, since its incorporation in the year 1961 and to report to the Company Law Board

inter alia "all the irregularities and contravention in respect of the provisions of the Companies Act, 1956 or of any other law for the time being in force and the person or persons responsible for such irregularities and contraventions" The order was made by the Chairman of the Board Mr R C Dutt on behalf of the Board by virtue of the powers conferred on him by certain rules to which we shall refer later On 4th June, 1965 the Company preferred a writ petition under Article 226 of the Constitution in the Punjab High Court for the issue of a writ of *mandamus* or other appropriate writ, direction or order quashing the order of the Board dated 19th May, 1965 The Managing Director, Mr Balasubramanian joined to the petition as petitioner No 2 The writ petition is directed against 7 respondents, the first of which is the Company Law Board The second respondent is Mr T T Krishnamachari, who was at that time Minister for Finance in the Government of India The Inspectors appointed are respondents 3 to 6 and Mr Dang is the 7th respondent Apart from the relief of quashing the order of 19th May, 1965, the appellants sought the issue of a writ restraining the Company Law Board and the Inspectors from giving effect to the order dated 19th May, 1965, and also sought some other incidental reliefs The order of the Board was challenged on 5 grounds which are briefly as follows

- (1) that the order was made *mala fide* ,
- (2) that in making the order the Board had acted on material extraneous to the matters mentioned in section 237 (b) of the Companies Act ,
- (3) that the order having in fact been made at the instance of the shareholders is invalid and on a true construction of section 237 this could not be done ,
- (4) that the order was invalid because it was made by the Chairman of the Board and not by the Board , and
- (5) that the provisions of section 237 (b) are void as offending Articles 14 and 19 (1) (g) of the Constitution

The allegations of *mala fides* were denied on behalf of the respondents They disputed the validity of all the other grounds raised by the petitioners The High Court rejected the contentions urged before it on behalf of the appellants and dismissed the writ petition The appellants thereafter sought to obtain a certificate of fitness for appeal to this Court , but the High Court refused to grant such a certificate They have now come up to this Court by Special Leave

In order to appreciate the arguments addressed before us a brief statement of the relevant facts would be necessary The Company was registered in the year 1961 and had an authorised capital of Rs 1 crore divided into 100 000 shares of Rs 100 each Its primary object was to carry on business of manufacturing all types of harium compounds Appellant No 2 was appointed Managing Director of the Company from 5th December, 1961, and his appointment and remuneration were approved by the Central Government on 30th July, 1962 The erection of the plant was undertaken by M/s L A Mitchell Ltd , of Manchester in pursuance of a collaboration agreement between it and the company entered in October, 1961 and approved by the Central Government in November of that year Thereafter a permit for importing the requisite machinery was granted to the Company The issued capital of the Company was Rs 50,00 000 and the public was invited to subscribe for shares in the Company It is said that the issue was over-subscribed by 12th March, 1962

It would seem that soon after the collaboration agreement was entered into M/s L A Mitchell Ltd , was taken over by a financial group (M/s S Peason & Co Ltd) to which a person named Lord Poole belonged It would appear that as the work of setting up of the plant was being delayed the company sent a notice to M/s Mitchell Ltd , on 2nd April, 1965, in which the Company stated that if the plant was not completely installed and got into running order by 1st June, 1965 the Company will have to make alternative arrangements and that it would hold M/s L A Mitchell Ltd liable to pay damages to the Company for the loss suffered by it As a result of the notice Lord Poole visited India in April, May, 1965 In his opinion the design of the plant was defective Certain negotiations took place between the

Company and Lord Poole in the course of which an undertaking was given by Lord Poole on behalf of the collaborators that the work would be completed with necessary alterations and modifications in accordance with the report of M/s. Humphrey & Co., and that the collaborators would spend an additional amount up to £ 250,000 as may be required for the purpose. It is said that the plant was producing at that time only 25 per cent. of its installed capacity but that according to the assurance given by Lord Poole it would yield full production by April, 1966.

According to the appellants, before entering into a Collaboration agreement with M/s. L.A. Mitchell Ltd., the appellant No. 2 Balasubramanian was negotiating with a German firm named Kali Chemie A.G. of Hanover for obtaining their collaboration. It is said that the firm of M/s. T.T. Krishnamachari & Sons were and still are the sole agents in India for some of the products of Kali Chemie. The firm of T.T. Krishnamachari & Sons approached appellant No. 2 for the grant of sole selling agency of the products of the plant to be established in collaboration with Kali Chemie. Appellant No. 2 did not agree to this with the result that the company's negotiations with Kali Chemie broke down. The appellants also say that T.T. Krishnamachari & Sons were later also granted a licence to set up a plant for manufacturing barium chemicals but that on appellant No. 2 bringing certain facts to the notice of Mr. Nehru the licence in favour of T. T. Krishnamachari & Sons was revoked. The relevance of these facts is in connection with the plea of *mala fides*. On this part of the case the appellant's contention is that the Chairman of the Company Law Board Mr. R.C. Dutt made the order for investigation into the affairs of appellant No. 1 at the instance of Mr. T.T. Krishnamachari, the then Finance Minister and also because of his bias against appellant No. 2. The suggestion is that as the licence of M/s. T.T. Krishnamachari & Sons was revoked and as they were not even given sole selling agency for the sale of the products of barium chemicals Mr. T.T. Krishnamachari wanted action to be taken under this provisions either for penalising appellant No. 1 or putting pressure on it.

A lengthy argument was addressed before us by Mr. Setalvad bearing on the question of *mala fides* in the course of which he referred us to certain documents. He also wanted us to bear in mind the sequence in which certain events occurred and said that these would indicate that the former Finance Minister must have been instrumental in having an order under section 237 (b) made by the Chairman of the Board. We were, however, not impressed by this argument. Our learned brother Shelat has dealt with this aspect of the matter fully in his judgment and as we agree with him it is not necessary to say much on the point. We would, however, like to refer to and deal with one aspect of the argument bearing on the question of *mala fides*. Mr. Setalvad points out that the Company Law Board had decided in December, 1964 to take action against appellant No. 1 under section 237 (b) and had actually obtained approval of Mr. T.T. Krishnamachari to the proposed action. Therefore, according to him the real order is of Mr. Krishnamachari even though the order is expressed in the name of the Board. We find no substance in the argument. The decision to take action was already taken by the Chairman and there is nothing to indicate that in arriving at that decision he was influenced by the Finance Minister. If the decision arrived at by the Chairman was an independent one it cannot be said to have been rendered *mala fide* because it was later approved by Mr. Krishnamachari whose sons undoubtedly constitute the partnership firm of M/s. T.T. Krishnamachari & Sons. It is also suggested by Mr. Setalvad that the action approved of in December, 1964 was delayed till May, 1965 because in the interval some negotiations with Kali Chemie had been started and had they ended fruitfully M/s. T.T. Krishnamachari & Sons would have secured the sole monopoly for sale of the products of barium chemicals. Now it does seem from certain material brought to our notice that negotiations with Kali Chemie were revived by appellant No. 2 because of the difficulties which were being experienced in the working of the collaboration agreement with M/s. L.A. Mitchell Ltd. No material however, is placed before us from which it could be reasonably inferred that had the negotiations with Kali Chemie fructified M/s. T.T. Krishnamachari & Sons would have secured the sole monopoly for sale of the products of barium chemicals. One more point was urged

in connection with this aspect of the argument and it is that the appellants were not given an opportunity to cross-examine Mr T T Krishnamachari and Mr Dutt. In our opinion in a proceeding under Article 226 of the Constitution the normal rule is, as pointed out by this Court in *The State of Bombay v Purshottam Jog Naik*¹, to decide disputed questions on the basis of affidavits and that it is within the discretion of the High Court whether to allow a person who has sworn an affidavit before it—as indeed Mr Krishnamachari and Mr Dutt have—to be cross-examined or not to permit it. In exercise of its discretion the High Court has refused permission to cross examine them. In such a case it would not be appropriate for this Court while hearing an appeal by Special Leave to interfere lightly with the exercise of that discretion.

Mr Setalvad said that as the appellants had made out a *prima facie* case of *mala fides* in their affidavits, and as these allegations had been denied by the respondents, the High Court was in error in refusing permission to the appellants to cross examine the persons who swore the affidavits on the side of the respondents. We are not aware of the rule on which Mr Setalvad bases himself. There is nothing to show that the High Court thought that a *prima facie* case of *mala fides* had been made out. Even in such a case a Court might well hold that it has been demolished by the affidavits in answer. The Court has to find the facts and if it finds that it can do so without cross examination it is not compelled to permit cross examination. We have no reason to think that the High Court could not have ascertained the facts on the affidavits themselves.

Coming to the second point, it would be desirable to reproduce section 237 which reads thus

“Without prejudice to its powers under section 235 the Central Government—

(a) shall appoint one or more competent persons as inspectors to investigate the affairs of a company and to report thereon in such manner as the Central Government may direct;—

- (i) the company by special resolution, or
- (ii) the Court, by order,

declares that the affairs of the company ought to be investigated by an inspector appointed by the Central Government, and

(b) may do so if, in the opinion of the Central Government there are circumstances suggesting—

(i) that the business of the company is being conducted with intent to defraud its creditors, members or any other persons or otherwise for a fraudulent or unlawful purpose or in a manner oppressive of any of its members, or that the company was formed for any fraudulent or unlawful purpose, or

(ii) that persons concerned in the formation of the company or the management of its affairs have in connection therewith been guilty of fraud, misfeasance or other misconduct towards the company or towards any of its members, or

(iii) that the members of the company have not been given all the information with respect to its affairs which they might reasonably expect including information relating to the calculation of the commission payable to a managing or other director, the managing agent, the secretaries and treasurers, or the manager of the company.

In view of the fact that the Central Government, by virtue of the powers conferred by sections 10 E and 637 delegated its powers under section 237 to the Company Law Board we shall read section 237 as if in place of the words “Central Government” there are the words “Company Law Board” or for brevity “Board”. According to Mr Setalvad, clause (b) of section 237 requires two things (1) the opinion of the Board and (2) the existence of circumstances suggesting one or more of the matters specified in sub-clauses (i) to (iii). He contends that though the opinion of the Board is subjective the existence of circumstances set out in the sub-clauses (i) to (iii) is a condition precedent to the formation of the opinion. Therefore, according to him, the Court is entitled to ascertain whether in fact any of those circumstances exists. The Attorney General disputes this construction and contends that the clause is incapable of a dichotomy and that the subjective process embraces that the formation of an opinion that circumstances suggestive of any of the matters comprised in sub-clauses (i) to (iii) exist.

Once it is conceded that the formation of an opinion by the Board is intended to be subjective—and if the provision is constitutional which in our view it is—the question would arise: what is that about which the Board is entitled to form an opinion? The opinion must necessarily concern the existence or non-existence of facts suggesting the things mentioned in the several sub-clauses of clause (b). An examination of the section would show that clause (b) thereof confers a discretion upon the Board to appoint an Inspector to investigate the affairs of a company. The words “in the opinion of” govern the words “there are circumstances suggesting” and not the words “may do so.” The words ‘circumstances’ and ‘suggesting’ cannot be dissociated without making it impossible for the Board to form an ‘opinion’ at all. The formation of an opinion must, therefore, be as to whether there are circumstances suggesting the existence of one or more of the matters in sub-clauses (i) to (iii) and not about anything else. The opinion must of course not have been arrived at *mala fide*. To say that the opinion to be formed must be as to the necessity of making an investigation would be making a clear departure from the language in which section 237 (b) is couched. It is only after the formation of certain opinion by the Board that the stage for exercising the discretion conferred by the provision is reached. The discretion conferred to order an investigation is administrative and not judicial since its exercise one way or the other does not affect the rights of a company nor does it lead to any serious consequences as, for instance, hampering the business of the company. As had been pointed out by this Court in *Raja Narayanlal Bansilal v. Maneck Phiroz Mistry and another*¹, the investigation undertaken under this provision is for ascertaining facts and is thus merely exploratory. The scope for judicial review of the action of the Board must, therefore, be strictly limited. Now, if it can be shown that the Board had in fact not formed an opinion its order could be successfully challenged. This is what was said by the Federal Court in *Emperor v. Shibnath Banerjee*², and approved later by the Privy Council in *Emperor v. Shibnath Banerjee*³. Quite obviously there is a difference between not forming an opinion at all and forming an opinion upon grounds, which, if a Court could go into that question at all, could be regarded as inapt or insufficient or irrelevant. It is not disputed that a Court cannot go into the question of the aptness or sufficiency of the grounds upon which the subjective satisfaction of an authority is based. But, Mr. Setalvad says, since the grounds have in fact been disclosed in the affidavit of Mr. Dutt upon which his subjective satisfaction was based it is open to the Court to consider whether those grounds are relevant or are irrelevant because they are extraneous to the question as to the existence or otherwise of any of the matters referred to in sub-clauses (i) to (iii).

Let us now examine the affidavit of Mr. Dutt. Since this affidavit is in answer to the allegations made in the writ petition the two should be considered together. In paragraphs 1 to 19 of the writ petition certain facts and figures concerning the formation, registration etc., of the company, the activities of the company and other related matters have been set out. These were admitted by Mr. Dutt in paragraph 14 of the counter-affidavit. Paragraph 20 onwards of the writ petition deals with the action taken by the Board and the various grounds on which according to the appellants the action of the Board is open to challenge. The first 4 paragraphs of the counter-affidavit deal with certain formal matters. In paragraph 5 Mr. Dutt has set out that the petition is liable to be dismissed summarily being grounded on facts which are false, speculative and lacking in material particulars. Thereafter he has set out what, according to him, are the true facts. In paragraphs 6 to 8 he has dealt with the legal aspects of the case. The 8th paragraph is the most important amongst them. Here Mr. Dutt has stated that it was not competent to the Court to go into the question of adequacy or otherwise of the material on the basis of which orders under section 237 (b) are passed by the Board. Then he stated :

1. (1961) 1 S.C.J. 353; (1961) M.L.J. (Cr.) 203; (1961) 1 M.L.J. (S.C.) 73; (1961) 1 An. W.R. (S.C.) 73; (1960) 30 Comp. Cas. 644; (1961) 1 S.G.R. 417.

2. (1943) F.L.J. (F.C.) 151; (1943) 2 M.L.J. 468; (1944) F.G.R. 1; A.I.R. 1943 F.C. 75.

3. (1945) L.R. 72 I.A. 241; (1945) 8 F.L.J. 222; 50 C.W.N. 25.

* However if in spite of what has been stated and contrary to the submissions above this Hon ble Court still holds that it is necessary for the Court to examine the relevant material in order to do justice then the Board would have no objections to producing the same for the Court's perusal provided it is not shown to the petitioners

It may be mentioned that the Court did not call for this material at all nor did the appellants seek its production. In paragraph 9 Mr Dutt has categorically stated that the order of 19th May, 1965 was passed after careful and independent examination of the material by the Chairman and that it was issued in proper exercise of the powers conferred upon it. He has specifically denied that it was issued at the instance of the second respondent. In paragraph 10 Mr Dutt has taken the plea that the petition was liable to be dismissed as it had not been made *bona fide* but for extraneous reasons and to create prejudice with a view to thwart statutory investigation. Then he has set out the circumstances upon which his contention is based. In paragraph 13 he has stated that without prejudice to his submissions in the earlier paragraphs he would reply to allegations contained in the various paragraphs of the writ petition. Then follows paragraph 14 upon which Mr Setalvad has founded an argument that the grounds disclosed therein being extraneous the order is invalid. In this paragraph Mr Dutt has admitted some of the facts stated in paragraphs 1 to 19. He has also said that the Board was aware of the fact that the Company had entered into collaboration with M/s L. A. Mitchell Ltd. He has then added,

" but it has no information of any of the other matters and/or negotiations with M/s L. A. Mitchell Ltd. Manchester. However from the Memoranda received by the Board referred to in paragraph 5 and other examination it appeared *inter alia* that

(i) that there had been delay, bungling and faulty planning of the project resulting in double expenditure for which the collaborators had put the responsibility upon the Managing Director. Petitioner No. 2.

(ii) Since its floatation the company has been continuously showing losses and nearly 1/3rd of its share capital has been wiped off.

(iii) that the shares of the company which to start with were at a premium were being quoted on the Stock Exchange at half their face value, and

(iv) some eminent persons who had initially accepted seats on the Board of Directors of the company had subsequently severed their connections with it due to differences with Petitioner number 2 on account of the manner in which the affairs of the company were being conducted.

In paragraph 5 it may be recalled Mr Dutt has set out the grounds on which the writ petition deserved to be summarily rejected. It will thus be clear that what are characterised by Mr Setalvad as the grounds upon which the order of the Board is based are nothing more than certain conclusions drawn by the Board from some of the material which it had before it. Moreover the expression *inter alia* used by Mr Dutt would show that the conclusion set out by him specifically are not the only ones which could be drawn from the material referred to by him in paragraph 5 of his affidavit.

Turning to paragraph 16 of the affidavit we find that Mr Dutt has clearly reiterated that there was ample material before the Board on which it could and did form the opinion that there were circumstances suggesting that as stated in the order of 19th May, 1965, the business of the company was being conducted with intent to defraud creditors, members and other persons and further that the persons concerned in the management of the affairs of the company had in connection therewith been guilty of fraud, misfeasance and other misconduct towards the company and its members. This paragraph is in answer to paragraph 21 of the writ petition. It is in that paragraph alone that the appellants had specifically raised the contention that the recital in the order as to the existence of material is not correct and that in point of fact there was no material before the Board to form the said opinion. In this state of pleadings it could not be right to construe the affidavit of Mr Dutt to mean that the only conclusions emerging from the material before the Board are those that are set out in paragraph 14 of his affidavit.

Apart from this we do not think that the conclusions set out in paragraph 14 are extraneous to the matters indicated in the order of 19th May, 1965. What is said therein is that there are circumstances suggesting that the business of the appel-

lants is being conducted with intent to defraud its creditors, members and others and that the persons concerned with the management of the affairs of the company have been guilty of fraud, misfeasance and other misconduct towards the company and its members. It has to be borne in mind that what the Board is to be satisfied about is whether the circumstances suggest any of these things and not whether they establish any of these things. Now, the first of its conclusion is to the effect that the materials show that there was delay, bungling, faulty planning of the project and that this resulted in double expenditure for which the collaborators had put the responsibility upon the Managing Director, that is, appellant No. 2. Would it be farfetched to say that these circumstances could reasonably suggest to the Board that these happenings, were not just pieces of careless conduct but were deliberate acts or omissions of appellant No. 2 done with the ulterior motive of earning profit for himself? Similarly could not the fact that the company was continuously showing losses since its floatation and that 1/3 of its share capital had been wiped out could have been suggestive of fraud to the Board?

In this connection, we think it right to point out that the spirit of the section must be kept in mind in determining its interpretation. The section was enacted to prevent the Management of a company from acting in a manner prejudicial to the interests of the shareholders for whom it was difficult to get together and take steps for the protection of their interests jointly. It was this difficulty of the shareholders—which is a reality—which had led to the enactment of the section. There is no doubt that few shareholders have the means or ability to act against the Management. It would furthermore be difficult for the shareholders to find out the facts leading to the poor financial condition of a company. The Government thought it right to take power to step in where there was reason to suspect that the Management may not have been acting in the interests of the shareholders—who would not be able to take the steps against a powerful body like the Management—and to take steps for protection of such interests. As we have said, the section gives the exploratory power only. Its object is to find out the facts, a suspicion having been entertained that all was not well with the company. The powers are exercised for ascertaining facts and, therefore, before they are finally known, all that is necessary for the exercise of the powers is the opinion of the Board that there are circumstances which suggest to it that fraud and other kinds of mismanagement mentioned in sub-clause (i) to (iii) of clause (b) of the section may have been committed. If the facts do reasonably suggest any of these things to the Board, the power can be exercised, though another individual might think that the facts suggest otherwise. It cannot be said that from a huge loss incurred by a company and the working of the company in a disorganised and un-businesslike way, the only conclusion possible is that it was due to lack of capability. It is reasonably conceivable that the result had been produced by fraud and other varieties of dishonesty or misfeasance. The order does not amount to a finding of fraud. It is to find out what kind of wrong action has led to the company's ill-fate that the powers under the section are given. The enquiry may reveal that there was no fraud or other similar kind of malfeasance. It would be destroying the beneficial and effective use of the powers given by the section to say that the Board must first show that a fraud can clearly be said to have been committed. It is enough that the facts show that it can be reasonably thought that the company's unfortunate position might have been caused by fraud and other species of dishonest action. In our opinion, therefore, the argument of Mr. Setalvad about the circumstances being extraneous cannot be accepted.

Coming to the third point of Mr. Setalvad pointed out that four ex-directors of the Company who had resigned submitted a memorandum to Mr. T. T. Krishnamachari while he was holding the office of Finance Minister in which grave allegations were made concerning the affairs of the Company and the management of the Company by the second appellant. The investigation, according to Mr. Setalvad, was the outcome of this memorandum and that by ordering it the Board has in effect enabled the ex-directors who continue to be shareholders to circumvent the provisions of sections 235 and 236 of the Companies Act. Section 235 deals with "Investigation of affairs of company on application by members

or report by Registrar" Clause (a) of this section provides that in the case of a company having a share capital the investigation can be ordered either on the application of not less than 200 members or of members holding not less than one tenth of the total voting power therein. We are not concerned with clause (b) and (c). Apparently the four ex-directors were not holding 10% of the voting power of the Company. At any rate the case was argued on this footing. Section 236 provides that such application has to be supported by such evidence as the Board, (reading 'Board' for 'Central Government') may require. It also empowers the Board to require the applicants to furnish security for such amount, not exceeding one thousand rupees as it may think fit, for the payment of the costs of the investigation. The contention is that though the Board acted upon the memorandum submitted by four ex-directors it did not even require them to comply with the provisions of section 236. The contention is that the order of the Board appointing Inspectors is invalid. In other words the argument amounts to this that the provisions of section 237 (b) have been utilised by the Board as a cloak for taking action under the provisions of section 235. In other words this is an argument that the order was made *mala fide*.

It is true that a memorandum was presented to Mr Krishnamachari by four ex-directors containing grave allegations against the two appellants. But it was not solely on the basis of this memorandum that action was taken by the Board. It is clear from the counter affidavit of Mr Dutt and particularly from paragraph 5 thereof that the Board had before it not only two sets of memoranda dated 30th May, 1964 and 9th July, 1964, respectively from four ex-directors of the Company alleging serious irregularities and illegalities in the conduct of the affairs of the Company but also other materials. The Board points out that over a long period beginning from September, 1961 the Department had been receiving various complaints in regard to the conduct of the affairs of the Company. One complaint had also been received by the Special Police Establishment and forwarded by it to the Department in November, 1963. The matter was enquired into by the Regional Director of the Board at Madras and he, in his report sent to the Board in September, 1964 suggested an urgent and comprehensive investigation into the affairs of the Company. In his affidavit the Chairman of the Board Mr Dutt has stated further in paragraph 5 (b) as follows:

"The material on the file was further examined in the light of the Regional Director's recommendation by the two Under Secretaries of the Board (Sarvashar M. K. Banerjee, CSS and K. C. Chand, I. R. S. at the headquarters of the Board in New Delhi and both of them endorsed the recommendation of the Regional Director to order an investigation. The matter was then considered by the Secretary of the Company Law Board in charge of investigation (Shri D. S. Dang, I.A.S.) and he also expressed his agreement that there was need for a deeper probe into the affairs of the company."

Then again in paragraph 5 (c) he has stated as follows:

"Accordingly the matter was put up to me at the end of November, 1964 and after consideration of all the material on record, I formed the opinion that there were circumstances suggesting the need for action under section 237 (b) of the Companies Act, 1956."

It is abundantly clear from all this that the investigation cannot be said to have been ordered either at the instance of the four ex-directors or on the sole basis of the memoranda submitted by them. There is, therefore, no contravention of the provisions of sections 235 and 236 of the Act. As a corollary to this it would follow that the order was not made *mala fide* or is otherwise invalid.

As already stated the appellant had challenged the provisions of section 237 (b) on the ground that they are violative of the fundamental rights under Articles 14 and 19 (1) (g) of the Constitution. Our brother Shelat has dealt with this attack on the provisions fully and we agree generally with what he has said while dealing with the contentions. We would, however, like to add that the company being an artificial legal person cannot, as held by this Court in *The State Trading Corporation of India Ltd v Commercial Tax Officer, Visakhapatnam and others*¹, claim the benefit of the provisions of Article 19 (1) (g) though appellant No. 2 Balasubramanian

can do so. We agree with our learned brother that the action proposed under section 237 (b) being merely exploratory in character, the fundamental right of Balasubramanian to carry on business is not affected thereby. Since that is so, the question whether the provisions of the aforesaid section are a reasonable restriction on the exercise of the right under Article 19 (1) (g) does not arise for consideration. In the circumstances, therefore, we do not think that there is anything more that we need say.

The last question is whether it was not competent to Mr. Dutt alone to take the decision that an investigation be ordered against the company. In taking the decision Mr. Dutt acted under a rule of procedure prescribed in the order dated 6th February, 1964. The validity of this rule is challenged by Mr. Setalvad on the ground that this amounts to sub-delegation of a delegated power and is *ultra vires* the Act. Clause (a) of sub-section (1) of section 637 read with section 10-E (1) empowers the Central Government to delegate its powers under section 237 to the Company Law Board. By notification dated 1st February, 1964 the Central Government has delegated, amongst other powers and functions, those conferred upon it by section 237 upon the Company Law Board. By another notification of the same date the Central Government has made and published Rules made by it in exercise of its powers under section 642 (1) read with section 10-E (5) rule 3 of which reads thus :

“ *Distribution of business.*—The Chairman may, with the previous approval of the Central Government, by order in writing, distribute the business of the Board among himself and the other member or members, and specify the cases or classes of cases which shall be considered jointly by the Board.”

By order dated 6th February, 1964 the Chairman of the Company Law Board specified the cases and classes of cases to be considered jointly by the Board and distributed the remaining business between himself and other members of the Board. Amongst the matters allocated to the Chairman is the appointment of an Inspector under section 237 to investigate the affairs of a company. This, Mr. Setalvad says, could not be done in the absence of an express provision in the Act. In this connection he has referred us to sub-section 4-A of section 10-E which was subsequently added—but not made retrospective—by an amendment of the Act which confers an express power on the Central Government to enable the Chairman to distribute the powers and functions of the Board. According to the learned Attorney-General this provision was enacted only to make what was implicit in section 10-E (5) read with section 642 (1) clear and that the distribution of the work of the Board being merely a matter of procedure the order of the Chairman allocating the power under section 237 (b) to himself did not amount to sub-delegation of the power of the Board.

Bearing in mind the fact that the power conferred by section 237 (b) is merely administrative it is difficult to appreciate how the allocation of business of the Board relating to the exercise of such power can be anything other than a matter of procedure. Strictly speaking the Chairman to whom the business of the Board is allocated does not become a delegatee of the Board at all. He acts in the name of the Board and is no more than its agent. But even if he is looked upon as a delegatee of the Board and, therefore, a sub-delegatee *vis-a-vis* the Central Government he would be as much subject to the control of the Central Government as the Board itself. For sub-section (6) of section 10-E provides that the Board shall, in the exercise of the powers delegated to it, be subject to the control of the Central Government and the order distributing the business was made with the permission of the Central Government. Bearing in mind that the maxim *delegatus non potest delegare* sets out what is merely a rule of construction, sub-delegation can be sustained if permitted by an express provision or by necessary implication. Where, as here, what is sub-delegated is an administrative power and control over its exercise is retained by the nominee of Parliament, that is, here the Central Government, the power to make a delegation may be inferred. We are, therefore, of the view that the order made by the Chairman on behalf of the Board is not invalid.

To sum up then, our conclusions may be stated thus : The discretion conferred on the Central Government by section 237 (b) to order an investigation and

delegated by it to the Company Law Board is administrative, that it could be validly exercised by the Chairman of the Board by an order made in pursuance of a rule enacted by the Central Government under section 642 (1) read with section 10-E (5), that the exercise of the power does not violate any fundamental right of the company, that the opinion to be formed under section 237 (b) is subjective and that if the grounds are disclosed by the Board the Court can examine them for considering whether they are relevant. In the case before us they appear to be relevant in the context of the matter mentioned in sub clauses (i) to (iii) of section 237 (b). Though the order could be successfully challenged if it were made *mala fide*, it has not been shown to have been so made. The attack on the order thus fails and the appeal is dismissed with costs.

Hidayatullah, J—We are concerned in this appeal with the legality of an order of the Chairman, Company Law Board, 19th May, 1965, (purporting to be under section 237 (b) of the Companies Act, 1956, declaring that the affairs of the Barium Chemicals, Ltd., be investigated. As a consequence Inspectors have been appointed and searches have been made. The Company and its Managing Director filed a petition under article 226 of the Constitution in the High Court of Punjab seeking to quash the order and on failure there have filed this appeal by Special Leave of this Court. The action of the Chairman was and is challenged on diverse grounds but those which were presented before us were few and clear cut. The action is challenged as without jurisdiction because not the Board but the Chairman alone acted, as *mala fide* because no honest opinion was formed on the matters which under the section give rise to the power but on irrelevant and extraneous material, and further because the order was passed under the influence and malice of a Minister of Cabinet who was interested in another Company belonging to his sons and sought this means to oust a rival.

The facts have been stated already in some detail by my brother Shelat and I need not take time in restating them. My brother Shelat has quashed the order and I agree with him in the order proposed by him but as I view the matter a little differently on some of the aspects of the case, I wish to record my reasons briefly.

Under the Companies Act, 1956, a power of superintendence over the affairs of Companies is retained by the Central Government in much the same way as the Board of Trade in England exercise over Companies in that country. This power is of two kinds (a) calling for information or explanation from the Company and (b) ordering an investigation into the affairs of the Company by appointment of Inspectors for inspection investigation and report. The power is not only varied but is capable of being exercised variously. The power to call for information is conferred on the Registrar in two different ways. Firstly jurisdiction is conferred on the Registrar by section 234 to call for information or explanation in relation to any document submitted to him, which information or explanation must be furnished on pain of penalties. If the information or explanation is not furnished or is unsatisfactory the Registrar can report to the Central Government for action. Secondly, if a contributory, creditor or other person interested places materials before the Registrar (a) that the business of the Company is being carried on in fraud of its creditors or of persons dealing with the Company or (b) otherwise for a fraudulent or unlawful purpose, the Registrar can after hearing the Company call upon it to furnish any information or explanation. A further power is conferred after 28th December, 1960 on the Registrar, who may, after being authorised by a Presidency Magistrate or a Magistrate, First Class, enter any place, search and seize any document relating to the Company its managing agents, or secretaries and treasurers or managing director or manager, if he has reason to believe that it may be destroyed or tampered with.

Sections 235—251 provide for investigation of the affairs of a company and for sundry matters related to such investigations. They follow the scheme of sections 164—175 of the English Act of 1948. Section 235 enables the Central Government to appoint inspectors for investigation and report generally if the Registrar reports under section 234 and also if a stated number of shareholders or shareholders possess-

ing a stated voting power apply. When members apply they must support their application by evidence and give security for costs of investigations. In the present case no action under any of the sections noted so far was taken but it was taken under section 237. This section is in two parts. The first part which is (a), compels the Central Government to appoint inspectors to investigate and report if the company by a special resolution or the Court by order declares that the affairs be investigated. The second part which is (b) gives a discretionary power. As this discretionary power was in fact exercised this is a convenient place to read part (b) of section 237. It reads :

" 237. Without prejudice to its powers under section 235, the Central Government

(a) * * * * *

(b) may do so (i.e., appoint one or more competent persons as inspectors to investigate etc.) if, in the opinion of the Central Government, there are circumstances suggesting—

(i) that the business of the company is being conducted with intent to defraud its creditors, members or any other persons, or otherwise for a fraudulent or unlawful purpose, or in a manner oppressive of any of its members, or that the company was formed for any fraudulent or unlawful purpose ;

(ii) that persons concerned in the formation of the company or the management of its affairs have in connection therewith been guilty of fraud, misfeasance or other misconduct towards the company or towards any of its members ; or

(iii) that the members of the company have not been given all the information with respect to its affairs which they might reasonably expect, including information relating to the calculation of the commission payable to a managing or other director, the managing agent, the secretaries and treasurers, or the manager, of the company."

By section 237 (b) the power is conferred on the Central Government but under the Companies (Amendment) Act, 1963, a Board of Company Law Administration consisting of a Chairman and a member has been set up. This Board is constituted under section 10-E which has been introduced in the parent Act. The section may be read here :

" 10-E. *Constitution of Board of Company Law Administration.*—(1) As soon as may be after the commencement of the Companies (Amendment) Act, 1963, the Central Government shall, by notification in the Official Gazette, constitute a Board to be called the Board of Company Law Administration to exercise and discharge such powers and functions conferred on the Central Government by or under this Act or any other law as may be delegated to it by that Government.

(2) The Company Law Board shall consist of such number of members, not exceeding five, as the Central Government deems fit, to be appointed by that Government by notification in the Official Gazette.

(3) One of the members shall be appointed by the Central Government to be the Chairman of the Company Law Board.

(4) No act done by the Company Law Board shall be called in question on the ground only of any defect in the constitution of, or the existence of any vacancy in, the Company Law Board.

(5) The procedure of the Company Law Board shall be such as may be prescribed.

(6) In the exercise of its powers and discharge of its functions, the Company Law Board shall be subject to the control of the Central Government."

The Board was constituted on 1st February, 1964 by a notification and by a notification of even date in exercise of the powers conferred by clause (a) of sub-section (1) of section 637 read with sub-section (1) of section 10-E of the Companies Act, the Central Government delegated its powers and functions to the Board under section 237 (b) among others. Simultaneously acting in exercise of the powers conferred by sub-section (1) of section 642 read with sub-section (5) of section 10-E the Central Government made the Company Law Board (Procedure) Rules, 1964 and one such rule dealt with distribution of business to the following effect :

" 3. *Distribution of business.*—The Chairman may, with the previous approval of the Central Government, by order in writing, distribute the business of the Board among himself and the other member or members, and specify the cases or classes of cases which shall be considered jointly by the Board."

The Chairman by an order dated 6th February, 1964 specified the cases or classes of cases which are to be considered jointly by the Board and distributed the remaining business of the Board between the Chairman and the members each acting individually.

The power under section 237 was placed among the powers exercisable by the Chairman singly. That is how action was taken in the name of the Board but by the Chairman and is the subject of challenge for the reason that a power delegated to the Board as a whole cannot be delegated to an individual member in the absence of a provision such as sub-section (4 A) added recently to section 10 E enabling the solidarity of the Board to be broken. Sub-section (4-A) of section 10-E which has been added by an amending Act of 1965, after the events in this case, reads

10-E (4-A)—The Board with the previous approval of the Central Government may by order in writing authorise the Chairman or any of its other members or its principal officer (whether known as secretary or by any other name) to exercise and discharge subject to such conditions and limitations if any as may be specified in the order such of its powers and functions as it may think fit and every order made or act done in the exercise of such powers or discharge of such functions shall be deemed to be the order or act as the case may be of the Board.

This sub-section enables the work of the Board to be distributed among members while sub-section (5) merely enables the procedure of the Board to be regulated. These are two very different things. One provides for distribution of work in such a way that each constituent part of the Board properly authorised becomes the Board. The other provides for the procedure of the Board. What is the Board is not a question which admits of solution by procedural rules but by the enactment of a substantive provision allowing for a different delegation. Such an enactment has been framed in relation to the Tribunal constituted under section 10-B and has now been framed under section 10 E also. The new sub-section involves a delegation of the powers of the Central Government to a member of the Board which the Act previously allowed to be made to the Board only. The statute, as it was formerly, gave no authority to delegate it differently or to another person or persons. When it spoke of procedure in sub-section (5) it spoke of the procedure of the Board as constituted. The lacuna in the Act must have been felt otherwise there was no need to enact sub-section (4 A). The argument of the learned Attorney General that sub-section (4-A) was not needed at all, does not appeal to me. It is quite clear that its absence would give rise to the argument accepted by me, which argument is unanswerable in the absence of a provision such as the new sub-section. My brother Shelat has dealt with this aspect of the case fully and I cannot add anything useful to what he has said. I agree with him entirely on this point.

I shall now consider the question of *mala fides*. This arises in two different ways. There is first *mala fides* attributed to the chairman because he is said to have acted under the behest of a Minister of Cabinet interested in another rival Company. It is not necessary to go into it. The Chairman obtained the opinion of quite a few of his assistants (perhaps more than was altogether necessary) and this fact is stated to establish his fairness to and honest dealing with the Company. There is nothing to show that this was done on purpose to cover up a conspiracy to do harm to the Company. On the other hand I cannot overlook the fact that the rival Company itself had obtained a licence to manufacture Barium Chemicals which it allowed to lapse. This shows that rivalry between two manufacturing concerns was not the prime motive. No doubt the rival Company had tried to obtain the sole selling rights of and even a share in this Company. This might have weighed with me but for the fact that the Company itself had done nothing even before action was taken to establish itself. The whole project had hung fire and capital was eaten into at a rapid rate because there were technical defects in the setting up of the plant and machinery. There was not much hope of profits as a sole selling agent or even as a partner. In these circumstances I cannot go by the allegations made against the Chairman of the Board personally or those made against the Minister and I find no evidence to hold that dishonesty on the part of the one or malice on the part of the other lies at the root of this action.

This brings me to the third and the last question namely whether *mala fides* or the *ultra vires* nature of the action has been established in this case to merit interference at our hands. In view of my decision on the question of delegation it is hardly necessary to decide this question but since contradictory opinions have been expressed on it by my brethren Mudholkar and Shelat, I must give my views on

this matter. The question naturally divides itself into two parts. The first is whether there was any personal bias, oblique motive or ulterior purpose in the act of the chairman. The second is what are the powers of the Board in this behalf and whether they have been exercised contrary to the requirements of the Act. The first ground has already been dealt with in part when I considered the malice and influence of the Minister. It may be said at once, that apart from that allegation, nothing has been said attributing to the Chairman any personal bias, grudge oblique motive or ulterior purpose. Even in the arguments it was not suggested that the Chairman acted from improper motives. Therefore, all that I have to consider is whether the action of the Chairman can be challenged as done either contrary to the provisions empowering him or beyond those provisions.

In dealing with this problem the first point to notice is that the power is discretionary and its exercise depends upon the honest formation of an opinion that an investigation is necessary. The words "in the opinion of the Central Government" indicate that the opinion must be formed by the Central Government and it is of course implicit that the opinion must be an honest opinion. The next requirement is that "there are circumstances suggesting etc." These words indicate that before the Central Government forms its opinion it must have before it circumstances suggesting certain inferences. These inferences are of many kinds and it will be useful to make a mention of them here in a tabular form :

- "(a) that the business is being conducted with intent to defraud—
 - (i) creditors of the company or
 - (ii) members or
 - (iii) any other person ;
- (b) that the business is being conducted
 - (i) for a fraudulent purpose or
 - (ii) for an unlawful purpose ;
- (c) that persons who formed the company or manage its affairs have been guilty of—
 - (i) fraud or
 - (ii) misfeasance or other misconduct—
 - towards the company or towards any of its members.
- (d) That information has been withheld from the members about its affairs which might reasonably be expected including calculation of commission payable to—
 - (i) managing or other director
 - (ii) managing agent
 - (iii) the secretaries and treasurer
 - (iv) the managers."

These grounds limit the jurisdiction of the Central Government. No jurisdiction, outside the section which empowers the initiation of investigation, can be exercised. An action, not based on circumstances suggesting an inference of the enumerated kind will not be valid. In other words, the enumeration of the inferences which may be drawn from the circumstances, postulates the absence of a general discretion to go on a fishing expedition to find evidence. No doubt the formation of opinion is subjective but the existence of circumstances relevant to the inference as the *sine qua non* for action must be demonstrable. If the action is questioned on the ground that no circumstances leading to an inference of the kind contemplated by the section exists, the action might be exposed to interference unless the existence of the circumstances is made out. As my brother Shelat has put it trenchantly :

"It is not reasonable to say that the clause permitted the Government to say that it has formed the opinion on circumstances which it thinks exist....."

Since the existence of "circumstances" is a condition fundamental to the making of an opinion, the existence of the circumstances, if questioned, has to be proved at least *prima facie*. It is not sufficient to assert that the circumstances exist and give no clue to what they are because the circumstances must be such as to lead to conclu-

sions of certain definiteness. The conclusions must relate to an intent to defraud, a fraudulent or unlawful purpose, fraud or misconduct or the withholding of information of a particular kind. We have to see whether the Chairman in his affidavit has shown the existence of circumstances leading to such tentative conclusions. If he has, his action cannot be questioned because the inference is to be drawn subjectively and even if this Court would not have drawn a similar inference that fact would be irrelevant. But if the circumstances pointed out are such that no inference of the kind stated in section 237 (b) can at all be drawn the action would be *ultra vires* the Act and void.

Now the Chairman in his affidavit referred to two memoranda dated 30th May, 1964 and 4th July, 1964, presented by certain ex directors and also stated that from September, 1961 complaints were being received in regard to the conduct of the affairs of the Company, and one such complaint was received from the Special Police Establishment in November, 1963. The nature of the complaints was not disclosed but in reference to the memoranda it was stated that "irregularities" and "illegalities" in the conduct of the affairs of the Company was alleged therein. It was also stated that the memoranda "were supported by documentary evidence and details of the impugned transactions and the signatories offered to produce witnesses with knowledge of these transactions". This was followed by an enquiry by the Regional Director of the Board at Madras (Shri R S Ramamurthi, I A S) who made a report in September, 1964. The report was next considered by two Under Secretaries and by the Secretary of the Company Law Board who all agreed "that there was need for a deeper probe into the affairs of the Company". The matter was then placed before the Chairman who formed the opinion that there were circumstances suggesting the need for action under section 237 (b). None of the reports was produced. Nor was there any indication in the affidavit what their drift was. There was considerable delay in taking up the matter and this was explained as occasioned by the language riots, and other more pressing occupation. It appears that in the High Court an offer was made to place the reports etc. in the hands of the Court provided they were not shown to the other side, but no such offer was made in this Court. The High Court did not look into the documents.

Had the matter rested there it would have been a question whether this Court should interfere with a subjective opinion, when the affidavit showed that there were materials for consideration. It would then have been a question whether this Court could or should go behind the affidavit. I leave that question to be decided in another case where it arises. In this case it is not necessary to decide it because the affidavit goes on to state

"However from the Memoranda received by the Board referred to in paragraph 5 and other examination it appeared *inter alia* that

(i) there had been delay, bungling and faulty planning of this project resulting in double expenditure for which the collaborators had put the responsibility upon the Managing Director, Petitioner No. 2,

(ii) Since its flotation the company has been continuously showing losses and nearly 1/3rd of its share capital has been wiped off,

(iii) that the shares of the company which to start with were at a premium were being quoted on the Stock Exchange at half their face value and

(iv) some eminent persons who had initially accepted seats on the Board of directors of the company had subsequently severed their connections with it due to differences with petitioner No. 2 on account of the manner in which the affairs of the company were being conducted (Paragraph 14 of the affidavit)

It may be mentioned that in paragraph 16 of the affidavit the Chairman also stated

"With reference to paragraph 21 of the petition I have already stated above that there was ample material before the Board on which it could and did form the opinion that there were circumstances suggesting that the business of the company was being conducted with intent to defraud its creditors, members and other persons and further that the persons concerned in the management of the affairs of the company had in connection therewith been guilty of fraud, misfeasance and other misconduct towards the company and its members."

The question thus arises what has the Chairman placed before the Court to indicate that his action was within the four corners of his own powers? Here it must be noticed that members are ordinarily expected to take recourse to the Registrar because there they have to be in a certain number or command a certain proportion of the voting power. They are also required to give evidence and the Company gets an opportunity to explain its actions. If section 237 (b) is used by members, as an alternative to section 236, the evidence must unerringly point to the grounds on which alone action can be founded. In my opinion there is nothing to show that the reports which were being received from September, 1961, or the report of the Special Police Establishment indicated fraud, illegality or action or actions with intent to defraud, as contemplated by the section. The affidavit merely says that these reports indicated the need for a deeper probe. This is not sufficient. The material must suggest certain inferences and not the need for "a deeper probe". The former is a definite conclusion, the latter a mere fishing expedition. A straightforward affidavit that there were circumstances suggesting any of these inferences was at least necessary. There is no such affidavit and the reason is that the Chairman completely misunderstood his own powers. This is indicated by the enumeration of the four circumstances I have extracted from his affidavit and I proceed to analyse them.

The first circumstance is "delay, bungling and faulty planning" resulting in "double expenditure" for which the collaborators had put the responsibility on the second appellant. None of these shows an intent to defraud by which phrase is meant something to induce another to act to his disadvantage. The circumstances mentioned show mismanagement and inefficiency which is not the same thing as fraud or misconduct. The second and the third circumstance merely establish that there was loss in making this project work and that a part of capital had been lost. This was admitted by the appellants who pointed out that after considerable negotiations they induced Lord Poole, the President of the collaborating firm, to invest a further sum of £2,50,000. This shows that the appellants were in a position to dictate to the collaborating company which they would not have been able to do if they were guilty of fraudulent conduct. The last circumstance does not also bear upon the subject of fraud and acts done with intent to defraud. That some directors have resigned does not establish fraud or misconduct. There may be other reasons for the resignation.

In the other part of the affidavit the Chairman has merely repeated section 237 (b) but has not stated how he came to the conclusion and on what material. In other words, he has not disclosed anything from which it can be said that the inference which he has drawn that the Company was being conducted with intent to defraud its creditors, members and other persons or persons concerned in the management of the affairs of the Company were guilty of fraud, misfeasance and misconduct towards the company and its members was based on circumstances present before him. In fact, paragraph 16 is no more than a mechanical repetition of the words of the section.

Coming now to the affidavit of Mr. Dang I find that he merely repeats what was stated in the affidavit of the Chairman. He also said that he had seen the papers, and agreed with his two Under Secretaries and the Regional Director that a "deeper probe" was necessary. There is no hint even in this affidavit that the circumstances were such as to suggest fraud, intent to defraud or misconduct, this is to say circumstances under which investigation can be ordered. The other affidavits also run the same way and it is not, therefore, necessary to refer to them. We are concerned really with the affidavits of the Chairman and Mr. Dang in relation to the exercise of the power conferred by section 237 (b). Neither proves the existence of circumstances under which the power could be exercised. In my opinion, therefore the action has not been proved to be justified. No doubt, the section confers a discretion but it sets its own limits upon the discretion by stating clearly, what must be looked for in the shape of evidence before the drastic act of investigation into the affairs of a company can be taken. The affidavits which were filed in answer to the

petition do not disclose even the *prima facie* existence of these circumstances. On the other hand, they emphasise only that there was mismanagement and losses which necessitated a "deeper probe". In other words, the act of the Chairman was in the nature of a fishing expedition and not after satisfaction that the affairs of the Company were being carried on even *prima facie* with the intent to defraud or that the persons in charge were guilty of fraud or other misconduct. As to the constitutionality of section 237 (b) I agree with my brethren Bachawat and Shelat and have nothing to add. I, therefore, agree with my brother Shelat that the appeal must be allowed. There will be no order about costs.

Bachawat, J.—The order dated 19th May, 1965 was passed by the Chairman of the Company Law Board. Mr Setelved submitted that only the Board could pass an order under section 237, the Central Government could delegate its function under section 237 to the Board but it had no power to authorise the Chairman to sub-delegate this function to himself and consequently, the Company Law Board (Procedure) Rules, 1964 made by the Central Government on 1st February, 1964 and the Chairman's order of distribution of business dated 6th February, 1964 delegating the function of the Board under section 237 to the Chairman are *ultra vires* the Companies Act and the impugned order is invalid. The learned Attorney General disputed these submissions.

As a general rule whatever a person has power to do himself, he may do by means of an agent. This broad rule is limited by the operation of the principle that a delegated authority cannot be re-delegated, *delegatus non potest delegare*. The naming of a delegate to do an act involving a discretion indicates that the delegatee was selected because of his peculiar skill and the confidence reposed in him, and there is a presumption that he is required to do the act himself and cannot re-delegate his authority. As a general rule,

"if the statute directs that certain acts shall be done in a specified manner or by certain persons their performance in any other manner than that specified or by any other person than one of those named is impliedly prohibited" (See Crawford on Statutory Construction 1940 Edn, Art 195 page 335).

Normally, a discretion entrusted by Parliament to an administrative organ must be exercised by that organ itself. If a statute entrusts an administrative function involving the exercise of a discretion to a Board consisting of two or more persons it is to be presumed that each member of the Board should exercise his individual judgment on the matter and all the members of the Board should act together and arrive at a joint decision. *Prima facie*, the Board must act as a whole and cannot delegate its function to one of its members.

The learned Attorney General submitted that a distribution of business among the members of the Company Law Board is not a delegation of its authority, and the maxim has no application in such a case. I cannot accept this submission. In *Cook v Ward*¹, the Court held that where a drainage board constituted by an Act of Parliament was authorised by it to delegate its powers to a committee, the powers so delegated to the committee must be exercised by them acting in concert and it was not competent to them to apportion these powers amongst themselves and one of them acting alone, pursuant to such apportionment could not justify his acts under the statute. Lord Coleridge, C.J., said at page 262

¹ It was not competent to them to delegate powers which required the united action of the three, to be exercised according to the unaided judgment of one of them.

Again in *Vire v National Dock Labour Board*², the House of Lords held that a local board set up under the scheme embodied in the schedule to the Dock Workers (Regulation of Employment) Order, 1947 had no power to assign its disciplinary function under clauses 15 (4) and 16 (2) of the scheme to a committee and the purported dismissal of a worker by the committee was a nullity. In my opinion, the distribution of the business of the Board among its members is a delegation of its authority.

But the maxim *delegatus non potest delegare* must not be pushed too far. The maxim does not embody a rule of law. It indicates a rule of construction of a statute or other instrument conferring an authority. *Prima facie* a discretion conferred by a statute on any authority is intended to be exercised by that authority and by no other. But the intention may be negated by any contrary indications in the language, scope or object of the statute. The construction that would best achieve the purpose and object of the statute should be adopted.

Under sections 10-E (1) and 637 (1) (a), the Central Government has power to constitute a Company Law Board and to delegate its functions to the Board. The Board can consist of such number of persons not exceeding five as the Government thinks fit. One of the members of the Board has to be appointed a Chairman and this necessarily implies that the Board shall consist of at least two members. As a matter of fact, the Government constituted a Board consisting of two members and appointed one of them as Chairman. To this Board the Government delegated its function under section 237. Section 637 shows that the function under section 237 can be delegated to the Board and to no other authority. The function under section 237 (b) involves the exercise of a discretion. *Prima facie* all the members of the Board acting together were required to discharge this function and they could not delegate their duty to the Chairman. However under sections 10-E (5) and 642 (1), the Central Government may frame rules regulating the procedure of the Board and generally to carry out the purposes of the Act. In the context of section 10-E I am inclined to construe this rule-making power liberally. The Central Government has power to constitute the Company Law Board, to delegate its functions to the Board and to control the Board in the exercise of its delegated functions. In this background, by conferring on the Central Government the additional power of framing rules regulating the procedure of the Board and generally to carry out the purposes of section 10-E, the Parliament must have intended that the internal organisation of the Board and the mode and manner of transacting its business should be regulated entirely by rules framed by the Government. The Government had therefore, power to frame the Company Law Board (Procedure) Rules, 1964 authorising the Chairman to distribute the business of the Board. In the exercise of the power conferred by this rule, the Chairman assigned the business under section 237 to himself. The Chairman alone could, therefore, pass the impugned order. Act No. 31 of 1965 has now inserted sub-section (4-A) in section 10-E authorising the Board to delegate its powers and functions to its Chairman or other members or principal officer. The power under sub-section (4-A) may be exercised by the Board independently of any rules framed by the Central Government. We find, however, that the Central Government had under sections 10-E (5) and 642 (1) ample power to frame rules authorising the Chairman to distribute the business of the Board. The wide ambit of this rule-making power is not cut down by the subsequent insertion of sub-section (4-A) in section 10-E.

Sections 235, 237 (a) and 237 (b) enable the Central Government to make an order appointing an Inspector to investigate the affairs of a company in different sets of circumstances and the contention that section 237 (b) is discriminatory and is violative of Article 14 must fail. I also think that section 237 (b) is not violative of Articles 19 (1) (f) and 19 (1) (g) of the Constitution. The company is not a citizen and has no fundamental right under Article 19. Appellant No. 2 who is the managing director of the company is not a citizen but even assuming that section 237 (b) imposes restrictions on his right of property or his right to carry on his occupation as managing director, those restrictions are reasonable and are imposed in the interests of the general public.

On the question of *mala fide*, I am inclined to think that the Chairman passed the order dated 19th May, 1965 independently of and without any pressure from the Minister. I am all the more persuaded to come to this conclusion having regard to the fact that in paragraph 14 of his affidavit the Chairman has disclosed the circumstances which he took into account in passing the order. In paragraphs 5, 8 and 16 of his affidavit, the Chairman stated that he had various materials on the

basis of which he passed the order. But on reading this affidavit as a whole and the affidavit of Mr Dang, I am satisfied that in paragraph 14 of his affidavit the Chairman has set out all the material circumstances which had emerged on an examination of the various materials before him. Briefly put, those circumstances are delay, bungling and faulty planning by the management resulting in double expenditure, huge losses, sharp fall in the price of the Company's shares and the resignation of some of the directors on account of differences in opinion with the managing director. I think that these circumstances without more, cannot reasonably suggest that the business of the Company was being conducted to defraud the creditors, members and other persons or that the management was guilty of fraud towards the company and its members. No reasonable person who had given proper consideration to these circumstances could have formed the opinion that they suggested any fraud as mentioned in the order dated 19th May, 1965. Had the Chairman applied his mind to the relevant facts he could not have formed this opinion. I am, therefore, inclined to think that he formed the opinion without applying his mind to the facts. An opinion so formed by him is in excess of his powers and cannot support an order under section 237 (b). The appeal is allowed, and the impugned order is set aside. I concur in the order which Shelat, J., proposes to pass.

Shelat, J.—The appellant company is a public limited company registered on 28th July, 1961 having its registered office at Ramavaram in Andhra Pradesh and the second appellant was at all material times and is still its managing director.

On 25th August, 1959 and 23rd April, 1960 appellant No 2 obtained two licences for the manufacture of 2,500 and 1,900 tonnes of barium chemicals per year in the name of Transworld Traders of which he was the proprietor. He then started negotiations with Kali Chemie of Hannover, West Germany to collaborate with him in setting up a plant. While he was so negotiating M/s T T Krishna machari & Co., who were the sole selling agents of the said German Company, approached the 2nd appellant for the sole selling agency of barium products of the plant proposed to be put up by the 2nd appellant. The 2nd appellant did not agree. On 5th December, 1960 M/s T T K & Co., applied for a licence for manufacture of barium chemicals. On 23rd December, 1960 the 2nd appellant wrote a letter to the Minister of Commerce and Industry objecting to the grant of a licence to M/s T T K & Co. Both were considered by the Licensing Committee. The Committee rejected the application of M/s T T K & Co., but advised them to apply again after six months. On a representation by M/s T T K & Co., the Committee reconsidered the matter and recommended the grant of licence to M/s T T K Chemicals Private, Limited. The second appellant once more protested, this time to the Prime Minister but that was rejected.

On 28th July, 1961, an agreement between the appellant company and L. A. Mitchell, Ltd., of Manchester was signed whereunder the latter agreed to put up the plant on the appellant company agreeing to pay them £184,500. On 27th November, 1961 the Government granted a licence to the Company for the import of machinery. In the meantime, respondent No 2 was appointed a Minister without portfolio and rejoined the Cabinet which he had left earlier owing to certain circumstances which are not relevant for the present. From January, 1962 to March, 1963, he continued as a Minister without portfolio but from March, 1963 to September, 1963, he became the Minister for Defence and Economic Co-ordination and thereafter the Finance Minister. On 30th August, 1962, the licence granted to M/s T T K Chemicals Ltd., was revoked as the company had decided to surrender it.

It would seem that the appellant company was not faring as well as was hoped and though it had been incorporated as early as July, 1961 production had not commenced. There arose also disputes among its directors. On 30th May, 1964 and 9th July, 1964 four of its directors submitted two memoranda alleging irregularities and even illegalities in the conduct of the company's affairs to the Company Law Board. According to the second appellant, the four directors were disgruntled directors, hostile to him and the company. The company was not able to start work in full capacity not because of any irregularities but because of the faulty planning.

and designing by the collaborators. The company realised this fact only in June, 1964 when it received a survey report after the breakdown of the plant during that month from M/s. Humphreys and Glaseow (Overseas) Ltd., Bombay. In September, 1964, a meeting was arranged in London between the company's representatives and the representatives of L. A. Mitchell, Ltd., of which Lord Poole was the Chairman. It was agreed that L. A. Mitchell, Ltd., should depute M/s. Humphreys and Glasgow, Ltd., London, to go through the designs etc., and to make a report showing the causes of the repeated failure of the plant and suggesting remedies therefor. Lord Poole also agreed that the factory would be commissioned without any further delay and that L. A. Mitchell, Ltd., would carry out the necessary repairs at their cost. While these negotiations were going on, representatives of M/s. Kali Chemie of Hannover arrived in India to negotiate a collaboration agreement with the company. On 4th April, 1965, a meeting of the company's directors was held in New Delhi which was attended by one Kriegstein, a representative of Kali Chemie and also by the General Manager of M/s. T. T. K. & Co. Certain proposals were discussed and it was decided that the company should give notice to L. A. Mitchell, Ltd., cancelling the agreement with them. Accordingly, by a notice dated 2nd April, 1965 the agreement with the said L. A. Mitchell, Ltd., was cancelled. On 7th May, 1965, representatives of the appellant company and of Kali Chemie met at Stuttgart when proposals for an agreement were discussed. One of these proposals was that the company should be re-organised and its share capital should be distributed in the following proportions : 49 per cent. to the appellant company, 26 per cent. to Kali Chemie and 25 per cent. to M/s. T. T. K. & Co. It was also proposed that Kali Chemie should take over the responsibility on the production side, the appellant company would be responsible for the management and M/s. T. T. K. & Co., should take over sales promotion. Before however these negotiations could take concrete shape, Lord Poole came over to India. A meeting was held on 10th May, 1965 between him and the directors of the appellant company. Lord Poole agreed that the British company would put in £2,50,000 in addition to the amount already invested by it and that production would commence from June, 1965. On 11th May, 1965 another meeting took place when it was decided that without prejudice to what was stated in the notice of 4th April, 1965, the appellant company should withdraw para. 9 thereof whereby the agreement between them was terminated. By 11th May, 1965, the position therefore was that the collaboration agreement between the company and L. A. Mitchell, Ltd., was agreed to be continued and consequently the negotiations with the German company and M/s. T. T. K. & Co., were not to proceed further.

On 19th May, 1965 the first respondent passed the impugned order which *inter alia* stated :—

"In the opinion of the Company Law Board there are circumstances suggesting that the business of M/s. Barium Chemicals, Ltd., is being conducted with intent to defraud its creditors, members and other persons ; and further that the persons concerned in the management of the affairs of the company have in connection therewith been guilty of fraud, misfeasance and other misconduct towards the company and its members.

Therefore, in exercise of the powers vested by clause (i) of section 237 of the Companies Act, 1956 (1 of 1956) read with the Government of India, Department of Revenue Notification No. G.S.R. 178, dated the 1st February, 1964, the Company Law Board hereby appoint * * *

as Inspectors to investigate the affairs of the company since its incorporation in 1961 * * *

On 25th May, 1965 search warrants were obtained by respondents 3 to 10 and accordingly search was carried out at the office of the company at Ramavaram and at the residence of the second appellant and several documents and files were seized. On 28th May, 1965, the second appellant submitted a representation to the Chairman of the first respondent Board. He explained that out of the company's paid-up capital of Rs. 50 lacs, shares of the value of about Rs. 47 lacs were owned by members of the public, that the company was the first of its kind in India, that it could not go into production soon because of the defective planning by the collaborators, that as a result of recent negotiations, the collaborators had agreed to invest £25,000 more and that the company's factory had now commenced production from April, 1964,

that the Board appeared to have acted on the complaints filed by the said four directors who resented the second appellant's refusal to purchase their holdings at a price above par demanded by them, that though those complaints were lodged some two years ago and were not acted upon, they were sought now to be made the basis of the impugned order on account of trade rivalry between the company and M/s T T K & Co, that the order was *mala fide* and that it was made on grounds extraneous to the provisions of section 237 (b) and at the instance of the second respondent. On receipt of this representation, the Chairman of the first respondent Board contacted the second respondent and at the latter's instance the Prime Minister by an order dated 31st May, 1965 transferred the case to the Home Minister.

It was against the background of these allegations that the appellants filed a petition in the Punjab High Court under Article 226 for having the impugned order quashed and for certain other reliefs. The appellants alleged therein that the impugned order was *mala fide* and passed at the instance of the 2nd respondent who was unfavourably disposed towards them, that it was made under Rules which were illegal, and lastly, that it was also illegal as it was passed under provisions violative of Article 14 and Article 19 (1) (g) of the Constitution. On 11th June, 1965, the appellants applied to the High Court for production of certain documents. That application was dismissed. On 7th September, 1965, they filed another application for cross examination of the 2nd respondent and production of two letters one dated 15th March, 1961 by one Schmidtman and the other dated 27th July, 1965 by Andhra Bank Ltd., to the Reserve Bank of India. The High Court did not pass any separate order on this application but dismissed it in the course of its judgment on the main petition on the ground that it was not necessary to take additional evidence and that the affidavits filed by the parties were enough for the disposal of the petition. On 7th October, 1965, the High Court dismissed the petition observing that the appellants had failed to establish their allegation as to *mala fides* and accepted the respondents' contention that the decision to order investigation was arrived at in December, 1964, but could not be crystallised into a formal order till 19th May, 1965 owing to language strikes in Madras and other administrative difficulties and that the fact the order was ultimately passed on 19th May, 1965 soon after the said meetings of the 10th and 11th May, 1965 was a mere coincidence. The High Court was also of the view that even assuming that the second respondent had retained his interest in M/s T T K & Co, and that firm was interested in the production of barium chemicals or for being appointed as sole selling agents or otherwise, the first respondent, its chairman and officials were not shown to have been aware of the second respondent's interest in M/s T T K & Co and therefore in the absence of any allegation of personal malice against them the allegation as to *mala fides* failed. The High Court also rejected the contention that section 237 (b) was *ultra vires* Articles 14 and 19 (1) (g) or that the procedure laid down under power conferred by the Rules or the Rules themselves were invalid.

On behalf of the appellants the following four contentions were raised: (1) that the impugned order dated 19th May, 1965 was *mala fide*, that the High Court erred in failing to give due weight to the personal hostility of the 2nd respondent against the appellants and deciding the petition on the footing that the first respondent was an independent authority and that it was its Chairman who on his own had formed the requisite opinion and passed the order and therefore the motive or the evil eye of the second respondent was irrelevant. The High Court also erred in failing to appreciate that even though the impugned order was by the Chairman, it had to receive and in fact received the second respondent's agreement and therefore if the second respondent's *mala fides* were established they would vitiate the order. Therefore, the High Court ought to have taken additional evidence and allowed the production of documents as prayed for by the appellants; (2) that even taking the circumstances said to have been found by the first respondent, they were extraneous to section 237 (b) and could not constitute a basis for the impugned order and the order therefore was *ultra vires* the section; (3) that the impugned order was in any case bad as it was passed by the Chairman alone acting under Rules under which such a power was conferred in contravention of the provisions of section 10-E; and

(4) that the impugned order was bad because section 237 (b) itself was bad as offending against Articles 14 and 19 (1) (g).

Before these contentions are dealt with it is necessary first to consider the relevant provisions of the Act, the Rules made thereunder and the order of distribution of work passed by the Chairman of the Board in pursuance of those Rules.

Section 234 empowers the Registrar to call for information or explanation, Sub-section (1) provides that if on perusing any document which a company is required to submit to him under the Act, the Registrar is of opinion that any information or explanation is necessary with respect to a matter to which such document purports to relate, he may call on the company to furnish the said information or explanation. If that is done it is the duty of the company and its officers to furnish information or explanation. If such information or explanation is not furnished or is inadequate, the Registrar has the power to order production of such books and papers he thinks necessary for his inspection and thereupon it is the duty of the company and its officers to produce such books and papers. Sub-section (4) provides for penal consequences for failure to furnish information or explanation or to produce the books and papers. Sub-section (6) provides that if the said information or explanation is not furnished within the specified time or if on perusal of such information or explanation, etc., furnished or produced under sub-section (3-A) or (4) the Registrar is of opinion that the document referred to in sub-section (1) together with such information or explanation to be furnished as aforesaid discloses an unsatisfactory state of affairs, he has to report the case to the Central Government. Sub-section (7) provides that if it is represented to the Registrar on materials placed before him by a contributory or a creditor or any other person interested that (i) the business of the company is being carried on in fraud of its creditors or of persons dealing with the company or (ii) otherwise for a fraudulent or unlawful purpose, he may call upon the company to furnish any information or explanation on matters specified in the order after giving the company an opportunity of being heard. The said representation must be by a contributory or creditor or a person interested and it must be on materials showing that the business of the company is being carried on in fraud of creditors or members or other persons dealing with the company or otherwise for a fraudulent or unlawful purpose. If he is satisfied that the representation is frivolous or vexatious he has to disclose the identity of such informant to the company, presumably, to enable the company to take such action against him as it thinks fit. Section 234-A deals with the seizure of documents by the Registrar in the circumstances set out therein. While section 234 deals with the Registrar's power to call for information or production of documents and papers, section 235 and onwards deal with investigation. Section 235 empowers the Central Government to appoint Inspectors to investigate the affairs of a company (a) on an application of not less than 200 members or by members holding not less than 1/10th of the voting power, or (b) on an application in the case of a company not having a share capital, of not less than 1/5th in number of persons on the company's register of members, or (c) on a report by the Registrar under sub-sections (6) or (7) read with sub-section (8) of section 234. Section 236 provides that an application by members under clause (a) or (b) has to be supported by such evidence as the Central Government may require. Thus both under section 234 and section 235 before action is taken certain conditions have to be complied with, under section 234, an opportunity of being heard and under section 235 the application has to be not only by a certain number of members but has to be accompanied by evidence.

Section 237 (a) authorises the Government to appoint investigators if the company by a special resolution or the Court by an order declares that the company's affairs should be investigated. Clause (b) empowers the Government to do so if in its opinion there are circumstances suggesting (i) that the business of the company is being conducted with intent to defraud its creditors, members or any other persons or otherwise for a fraudulent or unlawful purpose or in a manner oppressive of any of its members or (ii) that the company or the management of its affairs have in connection therewith been guilty of fraud, misfeasance or other misconduct towards the com-

pany or any of its members Sub-clause (iii) is not relevant and therefore need not be cited

Thus the consideration on which action is permissible under section 234 and the kind of action taken thereunder are different from those under section 237. It is true that the authority to take action under section 235 is the Government and the action authorised thereunder is investigation but action can be taken thereunder not *suo moto* but only on an application by a certain number of members or by members with a certain amount of voting power or on the Registrar's report. Section 234, besides, has nothing to do with investigation as section 235 and section 237 have though on a report under section 234 the Government can institute investigation under clause (e) of section 235. Section 10-E was inserted in the Act by Act LIII of 1963 and deals with the constitution of the Company Law Board. The Board constituted under this section consists of a Chairman and members. By a Notification No. G S R 176 dated 1st February 1964 the Central Government constituted the Company Law Board under section 10-E. By another Notification No. G S R 178 it delegated some of its powers under the Act including those under section 237 to the Board. On the same day, it also published Rules under section 642 (1) read with section 10-E (5) called the Company Law Board (Procedure) Rules, 1964. Rule 3 empowers the Chairman of the Board to distribute the business of the Board among himself and the other member or members and to specify the cases or classes of cases which shall be considered jointly by the Board. On 6th February, 1964 the Chairman, under the power vested in him by rule 3, passed an order distributing the business of the Board between himself, the other member and the Board. Under this order the business of ordering investigation under sections 235 and 237 was allotted to himself to be performed by him singly.

Reverting now to the contentions urged by Mr. Setalvad, the first was that the impugned order though passed by the Chairman of the Board was really the order of the second respondent and was actuated by malice and hostility which he bore towards the appellants. In the alternative, it was urged that if the order were held to be the order of the Chairman, it was passed at the 2nd respondent's instance, the Board and its Chairman being under his control and the order in fact having also been passed after he had agreed to it. The order in either event was *mala fide* and in fraud of the statute, it being actuated by the hostility which the 2nd respondent bore against the appellants. The *mala fides* alleged against the 2nd respondent fall under two heads: (1) the trade rivalry between the appellant company on the one hand and M/s. TTK & Co. on the other in which the 2nd respondent continued to retain interest in spite of his having apparently gone out as a partner, and (2) the personal hostility, political and otherwise which existed between the 2nd respondent and the appellants which actuated the 2nd respondent to have the impugned order passed with a view to ruin the company and the 2nd appellant.

As regards the first head of *mala fides*, Mr. Setalvad relied on certain documentary evidence, and argued that the second respondent exploiting his position as a Minister tried to further the interests of M/s. TTK & Co., in which he continued to have interest in one way or the other and that his stand that he went out of the firm long before he became the Minister and had nothing to do with it thereafter was not true. The registration of the firm on 21st December, 1943 shows that the 2nd respondent was a partner therein along with his son Narasimhan and one G. Veeraghavan. It appears that in 1947 there was a change in the firm's constitution. The registration on 18th April, 1947 shows that the 2nd respondent ceased to be a partner, his two sons T. T. Narasimham and T. T. Rangaswami, were henceforth the partners and in his place was substituted his minor son T. T. Basu, entitled to the benefits of the firm, the minor son being represented by the 2nd respondent as his father and the guardian. The said minor son attained majority on 27th April, 1947 but he gave notice of election to become a partner only on 5th April, 1952. It was said that this fact indicated that the 2nd respondent maintained his interest till April 1952. According to the 2nd appellant, the 2nd respondent's active interest in the firm did not cease even after 1952. Mr. Setalvad pointed out a letter dated 30th March, 1965

from Kali Chemie to the Manager of the firm in which the German concern acknowledged their gratitude towards the 2nd respondent in the following terms :—

"Moreover, we thank you for your good suggestion and reminder as to the next step to be taken; the production partly to be taken up in India. We owe special thanks to Mr. T. T. Krishnamachari for his readiness to put up the necessary plant. We gave you previously the assurance to consider such a question always favourably and we repeat that assurance."

The letter further suggested that the installation of the plant referred to therein should not be rushed through "unless there are other reasons, for instance import policy for certain preparations and/or equipment for pharmaceutical products". Reliance was also placed on a letter dated 15th March, 1961 by one Schmidtman, the appellants' representative in Hannover to the 2nd appellant in which it was stated that Kali Chemie were expecting a visit there by the 2nd respondent and were confident that "an arrangement can be reached in the matter proposed by you," presumably a collaboration agreement between the appellant company and the German Company. The submission was that these and the other such documents established that the 2nd respondent had all throughout retained interest in M/s. T.T.K. & Co., that there was on that account trade rivalry between him and the appellant company and that due to his sustained interest in the firm, apart from his three sons being the partners therein, it was hardly to be expected that the 2nd respondent would permit the appellant company to go on with its project. On the question of personal animosity, it was pointed out that soon after the 2nd respondent became the Commerce and Industries Minister in 1952, he was instrumental in getting a licence issued to Madras Motors Ltd. in December, 1953 for the manufacture of motor cycles. In March, 1955, another manufacturing concern, the Ideal Motors of Bombay, applied for a similar licence. But that application was rejected as the Standing Committee on Automobile Industry decided that there was no scope for manufacture of more than one make of motor cycles and scooters. After the 2nd respondent ceased to be a Minister in 1958, the 2nd appellant made a representation to the then Minister of Commerce and Industries against what he called manipulations in the policy of manufacture of motor cycles in favour of the said Madras concern with which he alleged the 2nd respondent was on friendly terms. The case of the 2nd appellant was that it was due to his efforts that the Government revised its policy in 1959, invited applications from other persons interested in the manufacture and on 9th April, 1960 granted a licence to the Ideal Motors of Bombay for manufacture of motor cycles. It was also pointed out that in the General Elections of 1957, the 2nd appellant supported the candidature of one Balasubramania Mudaliar, the rival of the second respondent.

Mr. Setalvad argued that these facts established at least a *prima facie* case of (i) the 2nd respondent's continued interest in M/s. T.T.K. & Co. in spite of his denial, (ii) the trade rivalry between the appellant company and M/s. T.T.K. & Co., (iii) the attempt of that firm to have control or at least a substantial interest in the appellant company through a collaboration agreement with the German company and (iv) of personal animosity. He contended that with this background the appellant company should have been afforded an opportunity to establish its case of *mala fide* by being allowed to cross-examine the 2nd respondent and the Chairman of the Board and of adducing further documentary evidence by compelling the respondents to produce such documents as were required by the appellants to establish their case. His contention was that the High Court erred in turning down the applications for cross-examination and production of documents. He also argued that under section 10-E (1) the first respondent Board was only a delegate of the Central Government and therefore the impugned order, though passed by the Board, was the order of the Government and the 2nd respondent being the head of the Department, that fact coupled with his agreement of that order, made the impugned order both in fact and in law his order.

In this connection reliance was placed on *Roopchand v. State of Punjab*¹. This decision cannot assist the appellants for the question decided there was that where

power is delegated to an authority and the delegate passes an order under such delegated power the order is the order of the Government and the Government cannot interfere with it in its revisional jurisdiction. In the present case we are not concerned with the question of the power of revision by the Government. Though the impugned order was passed under a power delegated to the Board, factually it was passed by the Chairman and not by the 2nd respondent. The appellant's case was that though the four directors who had resigned had submitted their memoranda the Board had declined to take any action. The allegation was that one Sabanathan one of the four directors and one Somasundaram who were the friends of the 2nd respondent and his sons had thereafter discussed the matter of the appellant company with the 2nd respondent that at the instance of the 2nd respondent they sent a petition to the Board and then the 2nd respondent directed the 7th respondent to prepare the impugned order. The case there stated is that the order was 'prepared by respondent No. 7 in accordance with the aforesaid directions given by respondent No. 2 without obtaining the prior approval of the members of the Company Law Board and the members of the Company Law Board never applied their mind to the material before the passing of the order. Thus the appellants' case as to *mala fides* was that the impugned order was not really the order of the Board but that it was made at the 2nd respondent's dictate and that though it was issued formally by the Board it was in truth that of the 2nd respondent who manoeuvred to have it passed.

The question then is: What were the materials placed by the appellants in support of this case which the respondents had to answer? According to para 27 of the petition the proximate cause for the issuance of the order was the discussion that the two friends of the 2nd respondent had with him, the petition which they filed at his instance and the direction which the 2nd respondent gave to respondent No. 7. But these allegations are not grounded on any knowledge but only on 'reasons to believe'. Even for their reasons to believe, the appellants do not disclose any information on which they were founded. No particulars as to the alleged discussion with the 2nd respondent, or of the petition which the said two friends were said to have made such as its contents its time or to which authority it was made are forthcoming. It is true that in a case of this kind it would be difficult for a petitioner to have personal knowledge in regard to an averment of *mala fides*, but then where such knowledge is wanting he has to disclose his source of information so that the other side gets a fair chance to verify it and make an effective answer. In such a situation this Court had to observe in the *State of Bombay v Purushottam Naik*¹, that as slipshod verifications of affidavits might lead to their rejection, they should be modelled on the lines of Order 19, rule 3 of the Civil Procedure Code and that where an averment is not based on personal knowledge the source of information should be clearly deposed. In making these observations this Court endorsed the remarks as regards verification made in the Calcutta decision in *Padmabati Das v Dhar*². Apart from this consideration it is clear that in the absence of tangible materials the only answer which the respondents could array against the allegation as to *mala fides* could be one of general denial. The affidavits of the respondents however do not rest with a mere denial. They contain positive averments to the effect that the impugned order was passed in exercise of the power conferred on the Board, that the order was independently made by the Chairman on materials before him and that the 2nd respondent had nothing to do with the making of it. Putting it in a somewhat different way, what was it that the respondents were expected to explain in their answer? The answer which they were expected to make was against the allegation that the order was not independently made by the Board that it was made at the instance of the 2nd respondent in consequence of the discussions he had with his said two friends who were made to file a petition and that the Board had mechanically issued it in obedience to the 2nd respondent's behest without applying its mind to any materials before it. It is obvious that in the absence of any particulars about the alleged discussion or the alleged petition or the alleged direction

given by the 2nd respondent or the sources of information on which the appellants had reasons to believe these things, the only answer which the respondents could give was a general answer that these allegations were not true and that the order was independently made by the Board and as recited therein it was passed by the Board as in its opinion the conditions of section 237 (b) were existant.

Can the High Court in these circumstances be said to have failed to exercise its discretion when it refused to take evidence in addition to the affidavit evidence by permitting the appellants to cross-examine the 2nd respondent and the Chairman of the Board and to compel production of documents which they desired to have produced? In a petition under Article 226, there is undoubtedly ample power in the High Court to order attendance of a deponent in Court for being cross-examined. Where it is not possible for the Court to arrive at a definite conclusion on account of there being affidavits on either side containing allegations and counter-allegations, it would not only be desirable but in the interest of justice the duty also of the Court to summon a deponent for cross-examination in order to arrive at the truth. As observed in *A. P. S. R. T. Corporation v. Satyanarayan Transports*¹, if the evidence led by the parties is tested by cross-examination it becomes easier to determine where the truth lies. In *B. Venkatarathnam v. Registrar of Co-operative Societies, Andhra Pradesh*², where allegations similar to the ones made in the present case were made this Court recognised the right of a party to apply for cross-examination. But the position in the present case is not as it was in that case. The appellants no doubt applied for cross-examination and production of certain documents but the High Court felt that this was not a case where it should exercise its discretion as the cross-examination of the two deponents would not serve any useful purpose. The view of the High Court was that even if the two deponents were to be called they could in the circumstances of the case only repeat their denials in the affidavits in answer to the allegations made in the petition and the affidavit in rejoinder and therefore such cross-examination would not take the Court any further than the affidavits. In view of the fact that the appellants were not in a position to give particulars of the allegations made by them, the generality of those allegations and particularly of the allegation that the impugned order was passed at the behest of the 2nd respondent, the only recourse left to the Chairman of the Board would have been to repeat in equally general terms what he had already stated in his affidavit viz., that it was his own order made independently of the 2nd respondent and that it was founded on the opinion formed by him on the materials before him. Even at the stage when the appellants made the application for cross-examination they did not state that they had any additional materials to face the deponents. In these circumstances it is not possible to say that the High Court erroneously exercised its discretion. Nor is it possible to say that its conclusion, that whatever motives and animosity the 2nd respondent might have had towards the appellants the appellants had failed to establish that the order was not independently made by the Chairman or that it was an order made at the instance or instigation of the second respondent, was erroneous. This is particularly so as except the allegation that the Chairman and the 7th respondent acted as the tools of the 2nd respondent, no *mala fides* or evil intent have been urged against them. It may be that certain circumstances such as the timing of the order might create suspicion, perhaps a strong suspicion but it is trite to say that suspicion, however grave, cannot substitute evidence. It is true as observed in *Pannalal Binjraj v. Union of India*³, that in a case where want of *bona fides* in the authority passing the impugned order is alleged the burden of proof though on the party alleging it, is to the extent of its being shown as reasonably probable. But the allegation made in the present case is that the impugned order was in fact the order of the 2nd respondent either because he directed the 7th respondent to make it or because he agreed to it or that it was passed by the Authority not on his own but at the behest of the second respondent. In the present case the Court is not directly concerned with the alleged malice the 2nd respondent might have against

1. A.I.R. 1965 S.C. 1303 at p. 1307.

3. (1957) 31 I.T.R. 565 : (1957) S.C.R. 232

2. C.A. No. 321 of 1965 decided on 6th May, at p. 259.
1965.

the appellants. The Board is a statutory authority, has an independent existence and the absence of *bona fides* with which the Court in such a case is concerned is that of the Board and not of the 2nd respondent. As observed in *Partap Singh v State of Punjab*¹, an allegation as to bad faith or indirect motive or purpose cannot be held established except on clear proof thereof. In the absence of any materials relating to the *mala fides* of the Board, and in particular, of materials to show that the order was passed at the dictate of the 2nd respondent, this part of the appellants case must fail.

But the contention which calls for a more serious consideration is that the circumstances disclosed in para 14 of the Chairman's affidavit and on which he is said to have formed his opinion were circumstances extraneous to section 237 (b) and hence the order was *ultra vires* the section. The contention was a two fold one (1) that though under clause (b) the opinion of the authority is subjective there must exist circumstances set out in the clause which are conditions precedent for the formation of the opinion, and (2) that assuming that this is not so, since the Chairman has disclosed the circumstances on which he formed the opinion, the Court can examine them and see if they are relevant for an opinion as to fraud or an intent to defraud. Reliance was placed on paras 14 and 16 of the Chairman's affidavit to show that the circumstances there stated show that in passing the order, matters totally extraneous to the section were taken into account rendering the order, *ultra vires* clause (b) of section 237. The other affidavits do not matter much as they only repeat what the Chairman has stated in his affidavit. The construction of clause (b) suggested by Mr Setalvad was that the clause requires two things (1) the opinion of the Central Government, in the present case of the Board, and (2) the existence of circumstances suggesting that the company's business was being conducted as laid down in sub-clause (i) or that the persons mentioned in sub-clause (ii) were guilty of fraud, misfeasance or misconduct towards the company or any of its members. According to this construction, though the opinion is subjective the existence of circumstances set out in clause (b) is a condition precedent to the formation of such opinion and therefore even if the impugned order were to contain a recital of the existence of those circumstances the Court can go behind that recital and determine whether they did in fact exist. The learned Attorney General opposed this construction and argued that the clause was incapable of such dichotomy, that not only the opinion was subjective but that the entire clause was made dependent on such opinion, for, what the clause lays down is that the authority must come to an opinion on materials before it that there exist circumstances, suggesting fraud or intent to defraud, etc. Such dichotomy, according to him is impossible and not reasonable because it cannot be that the authority must first ascertain by holding an inquiry that there are circumstances suggesting fraud or intent to defraud etc., and then form a subjective opinion that those circumstances are such as to suggest those very things. He emphasised that the words "opinion" and "suggesting" were clear indications that the entire function was subjective, that the opinion which the authority has to form is that circumstances suggesting what is set out in sub-clauses (i) and (ii) exist and therefore the existence of those circumstances is by itself a matter of subjective opinion. The Legislature having entrusted that function to the authority, the Court cannot go behind its opinion and ascertain whether the relevant circumstances existed or not.

The question is which of the two constructions is correct? In *Emperor v Sibnath Banerjee*¹ one of the questions which arose was with regard to the interpretation of the words "the Central Government or the Provincial Government if it is satisfied with respect to a particular person" in rule 26 of the Defence of India Rules 1939. What was questioned there was the correctness of the recital in the detention order that the Governor was satisfied that with a view to preventing the detenu from acting in a certain manner certain action was necessary. It was held that though the Court could not be invited to investigate the sufficiency of the material or the reasonableness

¹ AIR 1964 SC 72 at pp 77-81

² (1943) 2 MLJ 468 (1943) FLJ (FC) 151 (1944) FCR 1

of the grounds on which the Governor was satisfied, if the contention was that the Governor never applied his mind and therefore he could not have been satisfied, the Court could enter into that question, the ingredient of satisfaction being a condition precedent to the exercise of power notwithstanding the satisfaction being subjective and there being a recital as to the satisfaction in the order. Referring to *Liversidge v. Anderson*¹ and *Greene v. Secretary of State*² it was observed:

"If the ground of challenge against the orders thus sought to be impugned had been that the cases had never been placed before the Secretary of State at all, so that he never had any opportunity of exercising his mind with respect to them we have not the slightest doubt that this would have been a proper ground for challenge in a Court of law."

Again at page 42, the observations are :—

"The presence of the recital in the order will place a difficult burden on the detenu to produce admissible evidence sufficient to establish even a *prima facie* case that the recital is not accurate. If, however, in any case a detenu can produce admissible evidence to that effect, in my judgment, the mere existence of the recital in the order cannot prevent the Court considering such evidence and if it thinks fit, coming to a conclusion that the recital is inaccurate."

These observations were made on the footing that though the satisfaction was subjective, it was a condition precedent to the exercise of power and therefore the order was open to a challenge that it was not in conformity with the power. In appeal this view was endorsed by the Privy Council *King Emperor v. Sibnath*³. In *Machindar v. The King*⁴, the Federal Court dealing with similar words in section 2 of the Central Provinces and Berar Public Safety Act, 1948 again held that the Court can examine the grounds disclosed by the Government to see if they are relevant to the object which the Legislature had in view, viz., the prevention of acts prejudicial to public safety and tranquillity, for satisfaction in this connection must be grounded on materials which are of rationally probative value. In this case, the statute no doubt required that the grounds should be disclosed but that makes no difference to the principle that though the satisfaction was exclusively of the executive authority, it was nonetheless a condition precedent to the exercise of the power. In *Atmaram Vaidya's case*⁵ this Court while dealing with section 3 of the Preventive Detention Act, 1950 observed that though the satisfaction necessary thereunder was that of the Central or the State Government and the question of satisfaction could not be challenged except on the ground of *mala fides*, the grounds on which it was founded must have a rational connection with the objects which were to be prevented from being attained. At page 176 it is stated :—

"If, therefore, the grounds on which it is stated that the Central Government or the State Government was satisfied are such as a rational human being can consider connected in some manner with the objects which were to be prevented from being attained, the question of satisfaction except on the ground of *mala fides* cannot be challenged in a Court."

This view was again emphasised in *Shibban Lal Saksena's case*⁶, where it was said that the power of detention being entirely dependent on the satisfaction of the appropriate authority, the question of sufficiency of the grounds on which such satisfaction is based cannot be gone into provided they have a rational probative value and are not extraneous to the scope and purpose of the statute. This principle is not exclusively applicable to cases under such measures as the Defence of India Act or the Preventive Detention Act and has been applied also in the case of other statutes. Thus in the *State of Bombay v. K. P. Krishnan*⁷, while dealing with the discretion of the State Government to make or refuse to make a reference under section 10 (1) of the Industrial Disputes Act, 1947, Gajendragadkar, J., (as he then was) spoke for the Court in these words :—

"The order passed by the Government under section 12 (5) may be an administrative order and the reasons recorded by it may not be justifiable in the sense that their propriety, adequacy or satisfactory character may not be open to judicial scrutiny; * * * nevertheless if the Court

1. L.R. (1942) A.C. 206.

2. L.R. (1942) A.C. 234.

3. (1945) 2 M.L.J. 325 : L.R. 72 T.A.

4. 241, 268; (1945) F.C.R. 195 : (1945) F.L.J. 222.

5. (1949-1950) F.C.R. 827.

6. (1951) 1 M.L.J. 389 : (1951) S.C.J. 208 : (1951) S.C.R. 167.

7. (1954) S.C.R. 418 : (1954) 1 M.L.J. 143.

(1954) S.C.J. 73 : A.J.R. 1954 S.C. 179.

7. (1961) 2 S.C.J. 360; (1961) 1 S.C.R. 227.

is satisfied that the reasons given by the Government for refusing to make a reference are extraneous and not germane then the Court can issue and would be justified in issuing a writ of *mandamus* even in respect of such an administrative order¹

In *Dr Akshaibar Lal v Vice Chancellor*,¹ the question was with reference to termination of services of some of its employees by the University. The University in exercise of its power to terminate the services of its employees under Ordinance No. 6 passed the impugned order notwithstanding its having already taken action under Statute 30 under which the cases of the appellant and others were referred to the Solicitor-General who made his report to the Reviewing Committee on his finding that there was a *prima facie* case. The contention was that the resolution of the University lacked *bona fides* and was therefore invalid. The University contended that its powers were cumulative and that it could resort to either of the two remedies open to it. The action adopted by the University was executive. Yet, this Court held that though the University possessed both the powers and could exercise one or the other of them, the action as held in the *State of Kerala v C M Francis & Co*² could still be challenged on the ground of its being *ultra vires*. Hidayatullah, J., said that proof of alien or irrelevant motive is only an example of the *ultra vires* character of the action. The University having adopted action under Statute 30 it was not possible to undo everything and rely upon other powers which were not available in the special circumstances which led to action under the statute and that though the University had the discretion to adopt either of the two courses, the discretion could not be read in the abstract but had to be read within the four corners of Statute 30 and not outside it. In this sense action on matters extraneous to the statute conferring power is a species of the vice of *ultra vires*. These two are sometimes interrelated and slide into each other. When a power is exercised for a purpose or with an intention beyond the scope of or is not justified by the instrument creating it, it would be a case of fraud on power, though no corrupt motive or bargain is imputed. In this sense, if it could be shown that an authority exercising power has taken into account, it may even be *bona fide* and with the best of intentions, as a relevant factor something which it could not properly take into account in deciding whether or not to exercise the power or the manner or extent to which it should be exercised, the exercise of the power would be bad. See *Partap Singh v State of Punjab*³. Thus apart from an authority acting in bad faith or from corrupt motives it may also be possible to show that :

* an act of the public body though performed in good faith and without any taint of corruption was so clearly founded on alien and irrelevant grounds as to be outside the authority conferred upon that body and therefore inoperative. It is difficult to suggest any act which would be *ultra vires* under this head though performed *bona fide*.⁴ Per Warrington L.J., in *Short v Poole Corporation*⁵

Similar observations are also to be found in *Rameshwar v District Magistrate*,⁶ a case under the Preventive Detention Act, 1950, where this Court held that though the satisfaction of the relevant authority was subjective, a detenu would be entitled to challenge the validity of his detention on the ground of *mala fides* and in support of his plea urge that along with other facts which show *mala fides* the Court should also consider his grievance that the grounds served on him cannot possibly or rationally support the order. The challenge would be that the order was beyond the scope of the power as its exercise was on grounds irrelevant to the purpose and intention of the power. In *Estate and Trust Agencies Ltd v Singapore Improvement Trust*,⁶ a declaration made by the Improvement Trust under section 57 of the Singapore Improvement Ordinance, 1927 that the appellants' property was in an insanitary condition and therefore liable to be demolished was challenged. The Privy Council set aside the declaration on two grounds, (1) that though it was made in exercise of an administrative function and in good faith the power was limited by the terms of the said Ordinance and therefore the declaration was liable to a chalenge

1 (1961) 3 S C R 386

2 (1961) 1 S C J 493 (1961) M L J (Cri)

287 A I R 1961 S C 617

3 A I R 1964 S C 72 at pp 77-81

4 L R (1926) Ch 66-90

5 A I R 1964 S C 334

6 L R (1937) A C 898

if the authority stepped beyond those terms and (2) that the ground on which it was made was other than the one set out in the Ordinance. In *Ross Chunis v. Papadopoulos*¹, the challenge was to an order of collective fine passed under Regulation 3 of the Cyprus Emergency Powers (Collective Punishment) Regulations, 1955 which provided that if an offence was committed within any area of the colony and the Commissioner "has reason to believe" that all or any of the inhabitants of that area failed to take reasonable steps to prevent it to render assistance to discover the offender or offenders it would be lawful for the Commissioner with the approval of the Governor to levy a collective fine after holding an inquiry in such manner as he thinks proper subject to satisfying himself that the inhabitants of the area had been given an adequate opportunity of understanding the subject-matter of the inquiry and making representations thereon. The contention was that the only duty cast on the Commissioner was to satisfy himself of the facts set out in the Regulation, that the test was a subjective one and that the statement as to that satisfaction in his affidavit was a complete answer to the contention of the respondents. Rejecting the contention, the Privy Council observed:—

"Their Lordships feel the force of the argument, but they think if it could be shown that there were no grounds upon which the Commissioner could be so satisfied, a Court might infer either that he did not honestly form that view or that in forming it he could not have applied his mind to the relevant facts."

Though an order passed in exercise of power under a statute cannot be challenged on the ground of propriety or sufficiency, it is liable to be quashed on the ground of *mala fides*, dishonestly or corrupt purpose. Even if it is passed in good faith and with the best of intention to further the purpose of the legislation which confers the power, since the Authority has to act in accordance with and within the limits of that legislation, its order can also be challenged if it is beyond those limits or is passed on grounds extraneous to the legislation or if there are no grounds at all for passing it or if the grounds are such that no one can reasonably arrive at the opinion or satisfaction requisite under the legislation. In any one of these situations it can well be said that the authority did not honestly form its opinion or that in forming it, it did not apply its mind to the relevant facts.

Bearing in mind these principles the provisions of section 237 (b) may now be examined. The clause empowers the Central Government and by reason of delegation of its powers the Board to appoint Inspectors to investigate the affairs of the Company, if "in the opinion of the Central Government" (now the Board) there are circumstances "suggesting" what is stated in the three sub-clauses. The power is executive and the opinion requisite before an order can be made is of the Central Government or the Board as the case may be and not of a Court. Therefore the Court cannot substitute its own opinion for the opinion of the Authority. But the question is, whether the entire action under the section is subjective.

In *Nakkuda Ali v. Jayaratne*², the Privy Council had to construe the words "where the Controller has reasonable grounds to believe that any dealer is unfit to be allowed to continue as a dealer" occurring in Regulation 62 of the Defence (Control of Textiles) Regulations, 1945. Lord Radcliffe who spoke for the Board first considered the construction given to similar words in *Liversidge v. Anderson*³ and said:—

"Their Lordships do not adopt a similar construction of the words in Reg. 62 which are now before them. Indeed, it would be a very unfortunate thing if the decision in *Liversidge's case*³ came to be regarded as laying down any general rule as to the construction of such phrases when they appear in statutory enactments. It is an authority for the proposition that the words 'if A.B. has reasonable cause to believe' are capable of meaning 'If A.B. honestly thinks that he has reasonable cause to believe', and that in the context and attendant circumstances of Defence Regulations 18-B, they did in fact mean just that."

Having confined that construction to that case only, he proceeded to observe:

"After all, words such as these are commonly found when a Legislature or law-making Authority confers powers on a Minister or official. However read, they must be intended to serve in some sense as a condition limiting the exercise of an otherwise arbitrary power. But if the question whether the condition has been satisfied is to be conclusively decided by the man who wields the power the value of the intended restraint is in effect nothing. No doubt he must not exercise the power in bad

1. (1958) 1 W.L.R. 546.

2. L.R. (1951) A.C. 66.

3. L.R. (1942) A.C. 206.

faith but the field in which this kind of question arises is such that the reservation for the case of bad faith is hardly more than a formality

The Privy Council held that the aforesaid words in Reg 62 imposed a condition that there must in fact exist such reasonable grounds known to the controller before he could validly exercise the power of cancellation. Therefore, though the belief of the Controller that the dealer was unfit was subjective, existence of reasonable grounds on which the belief could be founded was objective and a limitation on his power. In *Ridge v Baldwin*¹, Lord Reid suggested the same construction of similar words occurring now a days in several statutes. Speaking about the rules of natural justice not having been abandoned as a sacrifice which war conditions required, he observed

"And I would draw the same conclusion from another fact. In many regulations there was set out an alternative safeguard more practicable in war time—the objective test that the officer must have reasonable cause to believe whatever was the crucial matter. (I leave out of account the very peculiar decision of this House in *Liversidge v Anderson*)"²

The words "reasonable grounds to believe" were considered thus to be a restraint on administrative power just as compliance of the rules of natural justice in a quasi-judicial power which otherwise would render the power arbitrary. A recent decision in *Vellukunnel v The Reserve Bank of India*³ is in point in this connection. Section 38 (3) (h) (iii) of the Banking Companies Act, 1949 was assailed there as being discriminatory and an unreasonable restriction. The impugned clause provided that the High Court shall order the winding up of a banking company on the Reserve Bank making an application for winding up "if in the opinion of the Reserve Bank (iii) the continuance of the banking company is prejudicial to the interests of the depositors". The learned Attorney General rightly pointed out that the question there was not so much on the meaning of the words "in the opinion of" as whether a law which requires the High Court to order winding up because the Reserve Bank is of that opinion is constitutional. But it is not without significance that the divergence of opinion in this Court was that according to the minority opinion the vice of the impugned provision lay in the power vested in the Reserve Bank to apply to the High Court for a winding up order exercisable solely on its subjective satisfaction while according to the majority opinion the power did not rest solely on the subjective satisfaction and that what the impugned clause did was to leave the determination of an issue to an expert body, viz., whether the continuance of the banking company is a question was detrimental to the interests of the depositors. To support of this view Hidayatullah, J., speaking for the majority made the following significant observation—

"It is enough to say that the Reserve Bank in its dealings with banking companies does not act on suspicion but on proved facts."

And again at page 672 he observed—

But this seems certain that the action (winding up) would not be taken up without scrutinising all the evidence and checking and re-checking all the findings.

Distinguishing a case arising from a statute like the Banking Companies Act from cases of detention and associations declared unlawful, he emphasised the fact that "the factual background will not be one of suspicion, and action will be based on concrete facts". The majority view thus vindicated the validity of the provision on the ground that under the power conferred thereby, the Reserve Bank had to determine, albeit instead of the Court, the issue whether the continuance of a particular banking company was detrimental to the depositors' interests. Though the words used were "in the opinion of" the opinion, though exclusively of the Reserve Bank was dependent on the determination by it of the aforesaid issue. Therefore, the words, "reason to believe" or "in the opinion of" do not always lead to the construction that the process of entertaining reason to believe or "the opinion" is an altogether subjective process not lending itself even to a limited scrutiny by the Court that such "a reason to believe" or "opinion" was not formed on relevant facts or within the limits or as Lord Radcliffe and Lord Reid called the restraints of

1 L.R. (1964) A.C. 40 73.

2 L.R. (1942) A.C. 203.

3 (1963) 1 S.C.J. 210 (1962) Supp. 3 S.C.R. 632

the statute as an alternative safeguard to rules of natural justice where the function is administrative.

The object of section 237 is to safeguard the interests of those dealing with a company by providing for an investigation where the management is so conducted as to jeopardize those interests or where a company is floated for a fraudulent or an unlawful object. Clause (a) does not create any difficulty as investigation is instituted either at the wishes of the company itself expressed through a special resolution or through an order of the Court where a judicial process intervenes. Clause (b), on the other hand, leaves directing an investigation to the subjective opinion of the Government or the Board. Since the legislature enacted section 637 (i) (a) it knew that Government would entrust to the Board its power under section 237 (b). Could the legislature have left without any restraints or limitations the entire power of ordering an investigation to the subjective decision of the Government or the Board? There is no doubt that the formation of opinion by the Central Government is a purely subjective process. There can also be no doubt that since the legislature has provided for the opinion of the Government and not of the Court such an opinion is not subject to a challenge on the ground of propriety, reasonableness or sufficiency. But the Authority is required to arrive at such an opinion from circumstances suggesting what is set out in sub-clauses (i), (ii) or (iii). If these circumstances were not to exist, can the Government still say that in its opinion they exist or can the Government say the same thing where the circumstances relevant to the clause do not exist? The legislature no doubt has used the expression "circumstances suggesting." But that expression means that the circumstances need not be such as would conclusively establish an intent to defraud or a fraudulent or illegal purpose. The proof of such an intent or purpose is still to be adduced through an investigation. But the expression "circumstances suggesting" cannot support the construction that even the existence of circumstances is a matter of subjective opinion. That expression points out that there must exist circumstances from which the Authority forms an opinion that they are suggestive of the crucial matters set out in the three sub-clauses. It is hard to contemplate that the legislature could have left to the subjective process both the formation of opinion and also the existence of circumstances on which it is to be founded. It is also not reasonable to say that the clause permitted the Authority to say that it has formed the opinion on circumstances which in its opinion exist and which in its opinion suggest an intent to defraud or a fraudulent or unlawful purpose. It is equally unreasonable to think that the legislature could have abandoned even the small safeguard of requiring the opinion to be founded on existent circumstances which suggest the things for which an investigation can be ordered and left the opinion and even the existence of circumstances from which it is to be formed to a subjective process. This analysis finds support in Gower's *Modern Company Law* (2nd Ed.) page 547 where the learned author, while dealing with section 165 (b) of the English Act observes that "the Board of Trade will always exercise its discretionary power in the light of specified grounds for an appointment on their own motion" and that "they may be trusted not to appoint unless the circumstances warrant it but they will test the need on the basis of public and commercial morality." There must therefore exist circumstances which in the opinion of the Authority suggest what has been set out in sub-clauses (i), (ii) or (iii). If it is shown that the circumstances do not exist or that they are such that it is impossible for any one to form an opinion therefrom suggestive of the aforesaid things, the opinion is challengeable on the ground of non-application of mind or perversity or on the ground that it was formed on collateral grounds and was beyond the scope of the statute.

Even assuming that the entire clause (b) is subjective and that the clause does not necessitate disclosure of circumstances, the circumstances have in the present case been disclosed in the affidavits of the Chairman and the other officials. Once they are disclosed the Court can consider whether they are relevant circumstances from which the Board could have formed the opinion that they were suggestive of the things set out in clause (b). Paragraph 14 of the Chairman's affidavit sets out the following :—

(i) there had been delay, bungling and faulty planning of this project, resulting in double expenditure for which the collaborators had put the responsibility upon the Managing Director, Petitioner No 2,

(ii) since its floatation the company has been continuously showing losses and nearly 1/3rd of its share capital has been wiped off

(iii) that the shares of the company which to start with were at a premium were being quoted on the stock exchange at half their face value, and

(iv) some eminent persons who had initially accepted seats on the Board of directors of the company had subsequently severed their connections with it due to differences with Petitioner No 2 on account of the manner in which the affairs of the company were being conducted.

No doubt the words "*inter alia*" occur in this paragraph but that expression means no more than that those which are set out were among others. But those others would be of the same category, for if they were of other category they would naturally be stated. The deponent would not be content by using the expression "*inter alia*" unless he meant that the things contained in that phrase were of the same type as those expressly set out. Paragraph 16 is in reply to para 21 of the petition which alleges that there was no material from which the Board could form the opinion and that no such opinion was in fact formed. In that para the Chairman has stated as follows —

* With reference to paragraph 21 of the petition I have already stated above (which means para 14) that there was ample material before the Board on which it could and had formed the opinion that there were circumstances suggesting, etc

The "ample material" referred to in this para is obviously the material from which the circumstances stated in para 14 of his affidavit were deduced. But the learned Attorney General argued that para 14 was an answer to paras 1 to 19 of the petition where the petitioners claimed the soundness of the company and secondly that if para 14 were to be construed as disclosing the circumstances, it must be read along with para 16 and that if so read they were capable of showing that there were materials suggesting intent to defraud, misfeasance, misconduct etc. Paragraph 14 no doubt states that it is in reply to para 1 to 19 of the petition. In this para the facts stated in paras 1 to 19 are admitted as being substantially correct except as regards the fact that while seeking approval of the Government to his appointment as the Managing Director, the 2nd appellant had stated that there was no formal agreement between him and the company. The para then sets out the facts that the company held the licence that it had made an agreement with the British Company but that the Chairman had no information with regard to the other facts stated in paras 1 to 19 of the petition. There the reply to paras 1 to 19 of the petition ends. Then follows the statement which is an independent averment, viz —

"However from the memoranda received by the Board referred to in paragraph 5 and other examination it appeared *inter alia* that"

Then follow the four circumstances already set out earlier. Paragraph 16, though a reply to para 21 of the petition, refers back to para 14 and relies on the statements made therein for an answer to the allegation in para 21 of the petition that there were no materials and therefore no opinion as required by section 237 (b) was ever formed. From the language and scheme of paras 14 and 16 it is thus impossible to escape the conclusion that between them they disclose and were meant to disclose all the materials from which the Board formed the opinion. In para 8 of his affidavit, the Chairman no doubt refers to other materials which he says he was agreeable to disclose to the Court though not to the appellants. But those materials, assuming they were before him, cannot help, for they would not disclose any circumstances other than those formulated in para 14. This is clear from the fact that as stated there, those circumstances were deduced from the said memoranda and 'other examination' meaning the examination of all the materials before him. The question is are the materials formulated in para 14 circumstances suggestive of the things set out in clause (b)? The learned Attorney General contended that on the assumption that para 14 disclosed the circumstances, they would suggest an intent to defraud, fraudulent management, misfeasance as misconduct, and that even if delay, bungling and faulty planning of the project might not suggest the relevant intent or purpose, they together with the facts that one third of the subscribed share capital was wiped off, the shares of the company being quoted at half of their face value and of some

eminent persons having severed their connection with the company would suggest that all was not well with the company or its management and that its management was conducted with the intent to defraud. He argued that in any event they would suggest that those responsible for it were guilty of at least misfeasance or misconduct.

The expression "with intent to defraud" connotes an intention to deprive by deceit, Construing section 165 of the Companies Act, 1862, Buckley, J. *In re London and Globe Finance Corporation Ltd.*¹, distinguished deception and fraud as follows:—

"To deceive is I apprehend, to induce a man to believe that a thing is true which is false and which the person practising the deceit knows or believes to be false. To defraud is to deprive by deceit: it is by deceit to induce a man to act to his injury. More tersely it may be put, that to deceive is by falsehood to induce a state of mind to defraud is by deceit to induce a course of action."

Lord Esher also said much the same thing in *Le Lievre v. Gould*².

"A charge of fraud is such a terrible thing to bring against a man that it cannot be maintained in any Court unless it is shown that he had a wicked mind. That is the effect of *Derry v. Peck*³. What is meant by a wicked mind? If a man tells a wilful falsehood, with the intention that it shall be acted upon by the person to whom he tells it, his mind is plainly wicked, and he must be said to be acting fraudulently. Again, a man must also be said to have a fraudulent mind if he recklessly makes a statement intending it to be acted upon, and not caring whether it is true or false. I do not hesitate to say that a man who thus acts must have a wicked mind. But negligence however great, does not of itself constitute fraud."

In *Re William C. Leitch Brothers*⁴, Maugham, J., held:

"If a company continues to carry on business and to incur debts at a time when there is to the knowledge of the director no reasonable prospect of the creditor ever receiving payment of those debts, it is in general a proper inference that the company is carrying on business with intent to defraud."

There is no such suggestion in the present case. The same learned Judge in *Re Patrick and Lyon*⁵, observed that the terms "defraud" and "fraudulent purpose" connote actual dishonesty involving, according to current notions of fair trading amongst commercial men, real moral blame". However much the Court may disapprove of a personal conduct it must consider whether he has been guilty of dishonesty. Misfeasance results from an act or conduct in the nature of a breach of trust or an act resulting in loss to the company. Misconduct of promoters or directors as understood in the Companies Act means not misconduct of every kind but such as has produced pecuniary loss to the company by misapplication of its assets or other act (*Cf. Re Kingston Cotton Mill Co. No 2*⁶, and *Cavendish Bentinck v. Fern*⁷).

Are the allegations set out in para. 14 of the Chairman's affidavit capable of suggesting an intent to defraud or a fraudulent or unlawful purpose either in the formation or conduct of the company or misfeasance or misconduct towards the company or its members? Delay, bungling and faulty planning of the project entailing double expenditure, continuous losses resulting in 1/3rd of the share capital being wiped out, shares being quoted at half their face value and severance of their connection by some eminent persons cannot by themselves suggest an intent to defraud or fraudulent management. As regards misfeasance or misconduct, it is not suggested in any of the affidavits, though the Board had before it the memoranda of the four directors, that the circumstances set out in paragraph 14 of the Chairman's affidavit had arisen as a result of any fraud or dishonesty on the part of the second appellant or that it was his act which had caused pecuniary losses to the company. Mere bungling or faulty planning cannot constitute either misfeasance or misconduct. But assuming that these circumstances were to be treated as suggestive of misfeasance and/or misconduct, the impugned order is an integral and indivisible order and the investigation ordered thereunder is not and by the very nature of it cannot be confined to finding out only misfeasance and/or misconduct. In this view, the order must be held as being beyond the scope of clause (b) and cannot be sustained.

1. L.R. (1903) 1 Ch. 728 732.

2. L.R. (1893) 1 Q.B. 491.

3. (1889) L.R. 14 App. Cases 337.

4. L.R. (1932) 2 Ch. 71.

5. L.R. (1933) Ch. 786.

6. L.R. (1896) 2 Ch. 279.

7. (1887) L.R. 12 App. Cases 652.

The next challenge is that the order contemplated by section 237 (b) being the order of the Central Government or the Board it must be that of the Board and not of its Chairman. The contention was that the powers and functions under section 237 having been delegated to the Board and not to any individual member the Board alone could pass the order that the Chairman had no competence to pass it and that Rule 3 and the said order of the Chairman to the extent that it purported to distribute the work individually to the Chairman and the other member were *ultra vires* section 10 E (1). The learned Attorney General, on the other hand, argued that section 10-E not only empowered the Government to constitute the Board but also simultaneously authorised it to prescribe its procedure under sub-section 5. What rule 3 did was to enable the Chairman to rationally divide amongst the Board its work under different sections of the Act. Under such division whether a particular work is done by one member or jointly by the Board, it is the Board which does that work and the orders so passed are by and of the Board, such distribution is nothing but procedure because procedure must involve the manner in which the Board would work and is not contrary either to section 637 (1) (a) which empowers the Government to delegate its power to the Board or to section 10-E. While delegating its power the Government may say that the Board shall exercise its delegated power by one of them or by the Board as a whole, but notwithstanding such distribution, it is the Board which acts. As an analogy he relied on section 10 A and section 10 B under which the Company Tribunal is constituted and which enable its Chairman to form Benches which discharge the functions entrusted to the Tribunal, to section 6 of the Code of Criminal Procedure and to Article 145 and the orders passed by this Court delegating certain powers to the Registrar to show that procedure might differ from Act to Act according to the legislative understanding of the word procedure. Therefore, he argued the expression 'procedure' must not be construed in any inflexible sense. When a particular procedure permits allocation of work for the smooth discharge or exercise of a function or power, it is not tantamount to sub-delegation but is simply distribution.

However wide a connotation of the word "procedure" one may accept there is a sharp cleavage between power and procedure. Section 10 E which provides for the constitution of the Board nowhere provides for the splitting up of the Board into benches as is expressly done in the case of the Tribunal under section 10 B nor does it provide for the distribution of work entrusted to the Board. It is true that sub-section 5 confers power on the Government to prescribe procedure. But that procedure is of the Board. If the Legislature intended that the Board should act by dividing its work amongst the members there was no obstacle in its way to provide for benches as is done under section 10 B. Section 637 (1) (a) empowers the Government to delegate its power to the Board no doubt, under such conditions restrictions or limitations as may be specified in the notification delegating such power. But the notification by which the Government delegated its power contains no conditions, limitations or restrictions. A provision enabling the Chairman to distribute the powers and functions delegated to the Board is not a provision prescribing conditions limitations or restrictions. Section 637 (1) (a) which authorises the Government to delegate its power clearly lays down that such delegation is to be made to the Board and no one else. Under sub-section 2 of section 637 certain powers and functions therein set out cannot be delegated to any other authority. The section thus contains both a positive and a negative mandate that the power under section 237 shall not be delegated to any other authority except the Board as constituted under section 10-E. Section 637 thus makes it clear that the Legislature wanted the powers under section 237 to be exercised by the Board and did not intend that they should be exercised singly by members constituting it. This conclusion is supported by the insertion of sub section 4-A in section 10 E by Act 31 of 1965 whereby the Legislature has permitted the Board to authorise its Chairman or any other member or its principal officer to exercise and discharge such of its powers and functions as it may think fit. If the learned Attorney General was right that the Government could under its power of prescribing procedure under sub-section 5 authorise the Chairman to distribute the Board's work there was no necessity of enacting sub-section 4-A.

at all. That contention, if correct, would render sub-section 4-A a superfluity. Since sub-section 4-A is not retrospective, any distribution of powers and functions made by the Chairman would be valid if made after and not before the enactment of Act XXXI of 1965. No assistance can also be had from the provisions and Acts relied upon by the learned Attorney-General, such as section 10-A or section 10-B of the Act or section 6 of the Code of Criminal Procedure or Article 145 of the Constitution. Under the first, there is an express provision providing for the constitution of benches of the Tribunal which was absent in section 10-E till sub-section 4-A was enacted; under the second the Code provides for setting up of different kinds of Courts with varying jurisdiction. Such an arrangement can bear no analogy as it is not distribution of power of one body to its components. The third illustration also give no assistance for it relates not to procedure but to entrustment of certain functions to the Registrar of this Court. Such power is there in Article 145 which is an inclusive Article.

It was however argued that under section 165 (b) of the English Companies Act 1948 a power similar to the one under section 237 (b) has been conferred on the Board of Trade. Reliance was placed on a passage in Halsbury's Laws of England (3rd Edition) Vol. VII at page 421 where it is stated that the Board of Trade never meets and for all practical purposes the President is the Board of Trade. It appears from this very passage that the Board was constituted by an Order-in-Council dated 23rd August, 1786 and consisted of the President and the holders of certain offices therein specified. But it is the President who takes the oath of allegiance and the official oath and it is he alone for all practical purposes who constitutes the Board. In point of fact certain statutes and orders in Council have empowered the President who is a senior Minister or one of the junior Ministers to act on behalf of the Board.¹ That being so, there is no question of distribution of work or delegation of power by the Board to the President. The statute conferring power on the Board of Trade itself has authorised the President to act on behalf of the Board. The Board set up under section 10-E therefore cannot bear analogy with the Board of Trade. Nor does that section or section 637 empower, as is the case of with the Board of Trade, the Chairman to exercise or discharge the Board's powers and functions. The statute having permitted the delegation of powers to the Board only as to the statutory Authority, the powers so delegated have to be exercised by the Board and not by its components. To authorise its Chairman to hand over those functions and powers is not procedure but sub-delegation which is not authorised by the Act. The effect of rule 3 and the order of distribution of work made in pursuance thereof was not laying down a procedure but authorising and making a sub-delegation in favour of the members. The only procedure which the Government could prescribe was the procedure in relation to the Board, the manner in which it should discharge and exercise the functions and powers delegated to it but it could not make a provision which under the cloak of procedure authorised sub-delegation. Both rule 3 and the order dated 6th April, 1964, made pursuant thereto are thus invalid and the impugned order made in pursuance of the power conferred under the said rule and the said order are incompetent and invalid.

Lastly, the order was attacked on the ground that section 237 (b) which empowers the making of such an order was violative of Articles 14 and 19 (1) (g). The challenge was raised on behalf of 2nd appellant only. The contention under the head of Article 14 was that the Act provided three different ways by which the Government can take action, under section 234 or section 235 and section 236 and lastly under section 237 (b), that the power contained under section 237 (b) was more drastic than under the former sections and that these sections enabled the Government to discriminate between companies and companies and pick and choose any one of them at its pleasure for action under section 237 (b). In support of this contention reliance was placed on *Suraj Mall Mohta & Co. v. A. V. Vishwantha Sastri*,¹ where section 5 (4) of the Taxation on Income (Investigation Commission) Act, 1947 was declared discrimina-

1. Hood Phillips : Constitutional and Administrative Law : 3rd Ed. 331.

2. (1954) S.C.J. 611 : 26 I.T.R. 1 : (1955) 1 S.C.R. 448.

tory legislation and *Meenakshi Mills Ltd v A V Viswanatha Sastri*¹, reported in the same volume at p 787 where section 5 (1) of the Act was struck down after the Income tax (Amendment) Act XXXIII of 1964 was enacted. These decisions, however cannot avail the petitioner for the reasons for which these provisions were struck down are lacking in the present case. No question of discrimination arises in regard to the powers under section 234 and section 237. Section 234 only empowers the Registrar to call for information or explanation and to take action where such information or explanation is not forthcoming. Under section 234 there is no power to order investigation either in the Registrar or the Government. Under section 235, no doubt the Government can appoint inspectors but it can do so under the three specified events set out therein. What sections 235 and 236 do is to give power to shareholders on the one hand and the Registrar through a report on the other hand to move the Government to take action. These sections do not authorise the Government to appoint inspectors *suo motu* as in the case of section 237 (b). The discretionary power directing an investigation is contained in section 237 (b). Therefore section 234, section 235 and section 236 and section 237 (b) give powers to different authorities viz, the Registrar and the Government, provide powers which are different in extent and nature, exercisable in sets of circumstances and in a manner different from one another. Therefore, there is no question of discriminatory power having been vested in the Government under these sections to pick and choose between one company and the other. The challenge under Article 14 therefore must fail.

As regards Article 19 (1) (g) the question is whether an order directing an investigation is a restriction and if so, is it a reasonable restriction? Mr Setalvad tried to seek assistance from the decision in *Saghir Ahmad v The State of U P*,² but that decision cannot assist him for in that case the U P Road Transport Act, 1951 deprived the petitioner of his right to carry on his business of plying stage carriages, on public highways and the impugned statute was passed before the enactment of clause 6 of Article 19 (1). It is true in a sense that when investigation is ordered, there would be inconvenience in the carrying on of the business of the company. It might also perhaps shake the credit of the company. The investigators have also the power to seize papers and their report is made admissible in evidence as opinion evidence under section 246. But an investigation directed under section 237 (b) is essentially of an exploratory character. When it is directed, it is not as if any restriction is placed on the right of the concerned company to carry on its business and no restrictions are imposed on those who carry on the company's affairs. Even if it is regarded as a restriction, it is not possible to say that it is not protected under clause 6 of Article 19 (1). As stated in *Narayanlal Baisilal v Manak Phiroz Mistry*³ though the Companies Act on the one hand throws open to all citizens the privilege of carrying on business with limited liability, on the other hand, since the company's business has to be conducted through human agency irregularities and even malpractices in the management of the company's affairs sometimes arise.

* If persons in charge of the management of companies abuse their position and make personal profit at the cost of the creditors, contributors and others interested in the company, that raises a problem which is very much different from the problem of ordinary misappropriation or breach of trust. The interest of the company is the interest of several persons who constitute the company, and thus persons in management of affairs of such companies can be classed by themselves as distinct from other individual citizens. A citizen can and may protect his own interest but where the financial interest of a large number of citizens is left in charge of persons who manage the affairs of the companies it would be legitimate to treat such companies and their managers as a class by themselves and to provide for necessary safeguards and checks against a possible abuse of power vested in the managers.

If sections 234 to 237 are viewed from this point of view there would be no difficulty in coming to the conclusion that there is neither the violation of Article 14 nor of Article 19 (1) (g). To these observations may be added the observations of

1 (1955) S C R 787 261 T R 713 (1955) M L J (S C) 73 (1961) M L J (Cr) 208
 1 M L J (S C) 21 (1955) S C J 62 (1961) 1 S C J 353 (1960) 30 Comp Cas 644
 2 (1954) S C J 819 (1955) 1 S C R 707 63 Bom L R 251 (1961) 1 S C R 417 at p
 3 (1961) 1 An W R (S C) 73 (1961) 1 445

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JUDGES OF THE SUPREME COURT OF INDIA.

(1st January, 1966 to 30th June, 1966)

Chief Justice :

The Hon'ble Mr. P. B. Gajendragadkar (upto 15th March, 1966).

The Hon'ble Mr. A. K. Sarkar (from 16th March, 1966).

Puisne Judges :

The Hon'ble Mr. Justice A. K. Sarkar (upto 15th March, 1966).

„ „ K. Subba Rao

„ „ K. N. Wanchoo.

„ „ M. Hidayatullah

„ „ J. C. Shah.

„ „ J. R. Mudholkar.

„ „ S. M. Sikri.

„ „ R. S. Bachawat.

„ „ V. Ramaswami

„ „ P. Satyanarayana Raju (Died on 20th April, 1966).

„ „ Raghubar Dayal (*Ad hoc* Judge from 4th April, 1966 to 7th May, 1966).

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Shri S. V. Gupte.

The Additional Solicitor-General of India :

Shri Niren De.

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the Company Law Committee in their report of 1952 where the Committee have noted that the need for a provision for investigation was generally recognized. While recognizing that in some cases the use of the powers of inspection and investigation may shake the credit of the company and affect its competitive position the Committee observed that such a risk "should not, however, deter us from considering the desirability of conferring adequate powers on an appropriate authority to investigate the affairs of a company where such investigation is *prima facie*, called for. Similar observations are also to be found in the Report of the Company Law Committee presented to the British Parliament in June 1962 in regard to a similar power of investigation under section 165 (b) of the English Act. In the context of the rapid pace at which industrialisation is taking place in the country and companies are floated with share capital of the size and volume not conceived of only a few years ago, chances of misuse of power, maladministration and malpractices have considerably increased. A safeguard such as a power of investigation becomes not only necessary but also inevitable for the protection of an increasing number of shareholders, creditors and other persons interested in such large companies. Considered from this angle there would be no difficulty in holding that even if the provision as to investigation amounts to a restriction, it is a reasonable restriction, especially so when the power under section 237 (b) as stated earlier can only be exercised on an opinion formed on the objective test of the existence of circumstances suggesting things set out in clause (b) of section 237. It is not therefore possible to uphold the challenge to the clause under either of these two heads.

Though the contentions regarding *mala fides* and the constitutional invalidity of section 237 (b) are not upheld, the appellants succeed in the other two contentions. The appeal is allowed and the impugned order is set aside. Since the appellants have partly succeeded and partly failed, there will be no order as to costs.

ORDER.

In accordance with the opinion of the majority the appeal is allowed but there will be no order as to costs.

K.G.S.

Appeal allowed.

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DRAFTING THE DELEGATED LEGISLATION

By

Brahma Bharadvaja.

"The art of draftsmanship consists of a sense of the use of language, together with a knowledge of the technical interpretations which are placed by law on certain forms of language."¹ A good legislative draft therefore indicates comprehensive knowledge of the subject-matter, relevant previous legislation—statutory and case-law, and a clear understanding of the problems to be dealt with by the law. A good draft should also be perfect in form. The language should be simple, precise, and grammatically correct. The importance of good drafting of statutory law is evident. In case of delegated legislation it has added significance for two simple reasons. Firstly, delegated legislation does not pass through the detailed parliamentary procedure, so the opportunity to scrutinize its form and contents is few before it goes into operation.² Secondly, delegated legislation operates immediately on the people. It is because statutory law is becoming more and more of skeleton type and dependent on delegated legislation for its operation.

It is difficult to define precisely a good legislative draft positively. It is however easier to define it negatively that it should not suffer from certain infirmities such as long and complicated sentence, wrong citation of parent authority, ambiguity, *ultra vires*, ousting Courts. The following discussion would indicate various defects from which delegated legislation sometimes suffer.

Drafting:

A careless draft omits citation of the parent authority correct reference to an enabling section, and short title to the rules; or it has wrong citation and complicated sentences. An incorrect reference to the parent authority causes inconvenience to the public. It then becomes difficult to trace the rules which are referred to in the orders, and also to locate those orders. Thus, for example, the S.R.O. 9 of 1957 issued by the Ministry of Defence, the S.R.O. 1400 of 1957, and the S.R.O. 431 of 1957 issued by the Ministry of Works Housing and Supply have no reference to the rules under which they are issued.³ The Ministry of Communications has not specifically cited the parent authority in the S.R.Os. 2950 of 1956, and 2951 of 1956. The same practice is repeated in the S.R.Os. 499, 663, 664, 665, 735, 794, 799, 800, 874, 878 and 973 all of 1957. The only explanation for such omission is that it has not been the practice to give preambles or cite a section of the parent Act.⁴

Another type of careless drafting comes to view when the authorities cite wrong references. To render necessary the licences for the use of premises within the Saugor cantonment as stable and cattle sheds built for profit, bye-laws were said to be framed under clause 37 of section 282 of the Cantonment Act of 1924. But this clause does not authorize the Cantonment Board to levy fees for the issue of licences. Sub-section (4) read with clauses (c) and (d) of sub-section (1) of section 210 and clause (16) of section 282 of the Act, of course, give necessary authority to the Board for the above matters.

1. Allen, Law and Orders, p. 116.

2. In India delegated legislation comes into operation immediately after it is published in the Gazette.

3. Also see S.R.Os. section 1713, 1714, 1715, 1716, 1717, 376 and 1325 all of 1857.

4. Committee on Subordinate Legislation (Second Lok Sabha) First Report, para. 74.

Usually rules regulations and schemes are issued under a specific section their scope being limited by that section. But sometimes rules which incorporate provisions of a parent Act do not give references. In such case the action of the authorities is quite legal though not always justifiable. In some cases they are made under sections more than one. For example the Delhi Municipal Corporation (Drainage) Bye laws of 1959 were framed under sections 242 (1) 481 (1) and 482.

The Employees Provident Fund Scheme of 1952⁵ is also said to be framed under section 5 of the Employees Provident Fund Act of 1952. Section 5 provides (1) The Central Government may by notification in the Official Gazette frame a scheme to be called Employees Provident Fund Scheme for the establishment of provident fund under this Act for employees or for any class of employees and specify the establishments or class of establishments to which the said scheme shall apply and there shall be established as soon as may be after the framing of the scheme a fund in accordance the provisions of this Act and the scheme. (2) A scheme framed under sub section (1) may provide that any of its provisions shall take effect either prospectively or retrospectively on such date as may be specified in this behalf in the Scheme.

The main points of the section are that (a) the section does not authorize for penal provisions in the Scheme (b) it does not have any provision for sub delegation in it (c) it does not authorize the Commissioner to grant exemption from the operation of the Scheme and (d) the class of employees and establishments to which the Scheme applies must be specified in the Scheme itself not otherwise.

Para 27 A (1) of the Scheme authorizes the Commissioner for Employees Provident Fund to exempt from the operation of all or any of the provisions of this Scheme any class of employees to whom the Scheme applies. Evidently the Commissioner cannot have such power within the ambit of section 5 (1) of the Act. But section 17 (1) authorizes a Government to exempt an establishment from the operation of all or any of the provisions of a Scheme. Under section 17 (2) the Scheme also may make provisions for exemption. But none of the above mentioned provisions of the Act sanction sub delegation of this power by the Central Government to the Commissioner. It can be exercised by the Central Government under section 5 (1) and by an appropriate Government under section 17.

Section 19 of the Act permits the appropriate Government to sub delegate its power. But the question is whether under this provision power to grant exemption can be given to the Commissioner by the Central Government under para 27 of the Scheme. Section 19 is independent of section 5 and power under the former should be exercised separately by an appropriate Government. The Central Government can only sub delegate its power but it is not competent to usurp the powers of the State Governments to grant exemption from the Act and from the scheme. Thus two separate notifications are required—one issuing the Scheme and another sub-delegating the authority. The two should not be incorporated into one.

To sum up the Act contemplates that three notifications should be issued the first under section 5 the second under section 17 and the third under section 19. In the present case the Central Government has exercised all the three powers through one notification under section 5.

There is another way in which confusion can result. Para 78 of the Scheme provides that (1) The Central Government may from time to time issue such directions to State Governments the Central Board or any other authority under this Act or Scheme as it may consider necessary for the proper implementation of the

⁵ Published with the Act by the Manager of Publications Delhi 1959 as modified upto 31st March, 1959.

Scheme or for the purpose of removing any difficulty which may arise in the administration thereof.' This sub-para. is interesting for two reasons—firstly, it is a modified graph version of section 19, and, secondly, it also includes power to remove difficulty under that section.

- Sub-para. (2) of para. 78 further reads that 'subject to the general control of the Central Government the State Government may issue any such direction to the Board'. As already noted, section 19 of the Act does not impose any conditions on the exercise of power by the State to issue directions; so the sub-para. conflicts with the provisions of the Act.

Ambiguity in Rules:

Ambiguity in the rules may be caused by the use of vague words and phrases, or by omission to mention definite numbers or words, or else by incomprehensibility of the rules. According to rule 32 of the Agricultural Produce Rules, if the National Co-operative Development and Warehousing Board finds that an institution which is not qualified to be a shareholder of the Corporation is by inadvertance or otherwise a shareholder of the Central Warehousing Corporation, it will inform the shareholder that it is not entitled to any dividends. Such decision of the Board is 'final'. Since the action of the Board is not adjudicatory, ordinary legal remedies are not barred; so the word 'final' only creates an ambiguity in the rules.⁶

Similarly, rule 3 of the All India Institute of Medical Sciences Rules of 1958⁷ prescribes the manner of the election of four members from the medical faculties of all the Universities under clause (f) of section 4 of the Act. But it also provides that such persons may be nominated by the Government; so it gives rise to the doubt whether the Government should nominate these persons. It was further doubted if so, in what cases such persons should be nominated and in what other cases they would not be so nominated. But the rule has now been amended substituting 'may' for 'shall'.⁸ A like provision occurs in rule 4 (1) of the Making of the Development Councils (Procedural) Rules. It leaves to the Government to decide whether the Chairman will be nominated by the Central Government or elected by the members, the procedure being indefinite.⁹

Similarly, uncertainty exists where a rule provides that the Chairman, or a member of a board or a committee may resign from his office. Such resignation takes effect from the date on which it is accepted by the Central Government.¹⁰ But no rule binds the Government to accept or even to consider the resignation. So, a tendered resignation may be kept pending for an unlimited period, which may virtually amount to its non-acceptance.

Sometimes an omission may cause ambiguity. Rule 3 of the Customs and Excise Duties Drawback (Trailers) Rule, for example, refers to certain conditions laid down by the provisions of some Acts; but it does not specify the title of those Acts.¹¹ Sometimes while seeking to amend or correct the rules, the authorities omit to mention the short title of the rules which are to be amended.¹² The public, therefore, is unable to make any sense out of the amendment. Again, para. 15 (1)

6. Committee on Subordinate Legislation (Second Lok Sabha) First Report, 110-113.

7. G.S.R. 135 of 1958.

8. G.S.R. 633 of 1958.

9. Committee of Subordinate Legislation (First Lok Sabha) Second Report, page 2.

10. E.G. Rule 4 of the Life Insurance Corporation Rules, 1956 (S.R.O. 1889-A of 1956); Rule 7 (3) of the Mines Rules (S.R.O. 1421 of 1956); Rule 6 of the National Shipping Board Rules, 1960 (G.S.R. 1920 of 1960).

11. G.S.R. 98 of 1958. Also see rule 3 of the Customs and Central Excise Duties Drawback (Bicycles) Rules, 1958 (G.S.R. 636 of 1958); the Customs and Central Excise Duties Drawback (Piperzine Syrup) Rules, 1958 (G.S.R. 876 of 1958).

12. E.G. G.S.R. 1309 of 1959; G.S.R. 195 of 1960, G.S.R. 75 of 1960; and G.S.R. 164 of 1960.

(c) of the Calcutta Dockworkers (Regulation of Employment) Scheme of 1956 requires that persons or firms other than those that are deemed to have been registered under item (b) 'shall not be registered as stevedores unless the Board considers it to be expedient and necessary to do so and that in no case shall a person or firm be registered until he or it has been licensed in that behalf by the Port Authority. In this rule it is not clear what constitutes the Port Authority because the Scheme has nowhere defined it'.¹³ Similarly the Working Journalists Wage Board Rules of 1956 do not specify who will constitute the Wage Board because section 8 of the Working Journalists (Conditions of Service) and Miscellaneous Provisions Act of 1955 under which the rules have been framed allows that the Central Government may constitute a Wage Board that the Board shall consist of an equal number of persons nominated by the Central Government to represent the employers in relation to a newspaper establishment and working journalists and that an independent person (appointed by the Central Government) shall be its Chairman. Thus even when the rules and the Act are read together it is not become clear what the number of the members of the Board should be.

Rules Causing Hardship

The rules may cause hardship to the subjects in several such ways as by restricting the movement of essential commodities by putting an unjustifiable restriction on fundamental rights by violating the principles of natural justice by giving inadequate notice, by offering a short notice within which an appeal against administrative decision can be made by prescribing no administrative procedure or by prescribing inadequate defective procedure. In some cases the defect is unintentional whereas in others it is intentional the rules being made with full knowledge of facts.

The Bombay Wheat (Movement Control) Order of 1956 permitted a bona fide traveller to carry wheat or wheat products upto five seers. This concession was however misused regularly by a number of persons who made frequent trips to neighbouring areas outside the limits of Greater Bombay and brought back five seers of wheat as part of their luggage. Such imported wheat was collected by traders and sold at exorbitant rates. By the end of June 1957 the State Government detected more than five hundred cases of unauthorized import of wheat. In view of these facts the Ministry of Food and Agriculture could not think of any other alternative than to withdraw the concession by S R O 3589 of 1957 even though some genuine consumers had to undergo inconvenience in the process.

Article 19 (1) (f) guarantees right to acquire hold and dispose of property and Article 19 (1) (g) to practise any profession or carry on any trade or business. *Manufacture of gur (jaggery)* is also one of the trades occupations etc. Under section 3 of the Essential Commodities Act of 1955 the Central Government issued the Punjab Sugarcane Order¹⁴ which prohibits the use of sugarcane by any person for the manufacture of gur within a radius of ten miles of any mill manufacturing sugar by vacuum pan process in the Punjab. The purpose of this Order according to the Ministry of Food and Agriculture was to ensure adequate supply of sugarcane to the sugar mills in the State because canegrowers preferred manufacture of gur to selling sugarcane to the mills. Further the canegrowers are not prevented absolutely from using sugarcane for a purpose other than the manufacture of gur viz., Khandsari rab etc. So it does not put an absolute or unreasonable restriction on the use of sugarcane.

But it is not clear why the Government has prohibited the use of sugarcane for the manufacture of gur only. The purpose of the Order gets defeated if it shall be consumed in purposes other than its supply to the mills. The order

13. S R O 2315 of 1956

14. G.S.R. 220 of 1959

offends the right of gur manufacturers if not of canegrowers. The order is bad, because it does not take into account that jaggery is consumed in large quantities practically in every home in the countryside. It does not allow the manufacture of gur even in small quantities for their own use if they so desire.¹⁵

Again, para. 5 of the S.R.O. 407 of 1957, issued under the Cantonments Act of 1924, imposes octroi on consignment carried by rail to be charged on the actual weight of the consignment imported or on the actual weight shown in the Railway Receipt whichever is heavier. There is no railway station at or in the vicinity of Khas Yol Cantonment to which the S.R.O. applies. There is, therefore, no possibility of bringing consignment by rail, and so no justification to charge octroi on the weight which is heavier than what is actually imported.

Rule 143 of the Representation of People (Conduct of Elections and Election Petitions) Rules of 1956¹⁶ allows fourteen days, counted from the date of determination of the amount of compensation under section 161 of the Representation of People Act of 1951. Within this period any owner of premises or vehicles who is aggrieved by the amount of compensation may make an application for referring the matter to arbitration. The Committee on Subordinate Legislation thinks that the fourteen days should be calculated from the date on which the person is intimidated of the amount of compensation, not from the date of its determination.¹⁷ The reason is that, owing to the administrative slackness and the time taken in the routine, very little time may be left to make further appeal. The plea of the Ministry of Law for retaining this provision is that the rule is a reproduction of rule 123 of the Rules of 1951. Since it has not caused any difficulty during the last five or six years, the rule may remain as it is.¹⁸ But the good practice established by the former rule 123 is not binding on actions under rule 143. So the Ministry has amended the rule according to the suggestions made by the Committee.¹⁹

Inadequate Short Notice,

Sometimes a rule makes a provision that if the required quorum is wanting, the meeting on that day may be adjourned. The meeting so adjourned may be called again by the presiding officer within a certain time. The G.S.R. 549 of 1959 substituted rule 20 of the Coffee Rules of 1955. Under the rule as amended, an adjourned meeting may be summoned not later than three days. Such a meeting may lawfully transact the business of the original meeting irrespective of the quorum. The purpose of adjourning a meeting for want of quorum is to fill it by issuing fresh notice of the meeting. The time of three days is certainly too short in view of the fact that the members may have to come from distant places and find it difficult, and sometimes even impossible to attend an adjourned meeting. Due account should, therefore, be taken of the time taken in sending the notice or in reaching the place of meeting.

Similarly, the Calcutta Dock Workers (Regulation of Employment) Scheme of 1956 was framed under the Dock Workers (Regulation of Employment) Act of 1956. A proviso to clause 15 (1) (e) of the Scheme gives discretionary power to the Dock Labour Board to dissolve the group of registered employers formed under the Scheme, if it is satisfied that the employers have failed to comply with the conditions prescribed for the formation of such groups. There is no provision for appeal against the order or an opportunity for the employers to present their case and be heard. According to the Ministry of Labour, opportunity for hearing is not considered necessary in view of the fact that power to dissolve a

15. The Order was rescinded on 25th May, 1959. See also The Committee on Subordinate Legislation (Second Lok Sabha) Tenth Report, 5-10.

16. S.R.O. 1943 of 1956.

17. Committee on Subordinate Legislation (Second Lok Sabha) First Report.

18. *Ibid*, para. 41.

19. S.R.O. 4163 of 1957.

group of employers is vested in the Dock Labour Board which includes the representatives of employers. Thus the employers have ample opportunity to put their views before the Board when a proposal for the dissolution of a group of employers is considered. But there is no specific mention whether an affected group particularly will have representation in the Board when a proposal for its dissolution is under consideration.

Omission to lay down Procedure.

The Coal Mines Regulations of 1957²⁰ are issued under section 57 of the Mines Act of 1952. Regulation 11 provides for the constitution of a Board of Mining Examinations to grant various certificates under the Regulations. But the Regulations do not prescribe procedure for the working of the Board such as the quorum and mode of arriving at a final decision, it being left to have its own bye-laws for the purpose. Similarly, rule 23 of the Minerals Conservation and Development Rules of 1958²¹ also does not lay down any procedure to ensure that the directives issued by the Director of Indian Bureau of Mines are duly brought to the notice of the owner, agent, or manager of a mine who is to carry it out. Non-compliance with a directive makes him liable to punishment with fine or imprisonment or both.

Clause 18 of the Tea (Distribution & Export) Control Order of 1957 also confers wide power on a licensing authority, but omits to provide for procedural safeguard such as the presence of witnesses. The clause authorizes the licensing authority to enter and search at any time any land, building, premises, vehicles, vessels, aircraft, plant or machinery upon or in which it has reason to believe that tea is stored, carried, distributed or sold in contravention of the provisions of the Order, and may seize any tea or product of tea which appears to be stored, carried, distributed or sold in contravention of the provisions of the Order. Similar powers are also conferred by some orders under the Essential Commodities Act of 1955, but they ignore such safeguards as provided by the Criminal Procedure Code, for example, the presence of witnesses, preparation of inventory of goods seized and giving a copy thereof to the person concerned.²²

Whenever a licence is terminated, the licensee is given an opportunity to explain why his licence should not be cancelled. But bye-law 9 of the bye-laws for the provision of culverts and pavement in Shahajhanpur Cantonment authorizes the Central Government and the Cantonment Board to terminate any time without notice a licence to construct culverts or pavements.²³

Wide Discretion.

Clause 6 of Appendix IV of the Telegraph Engineering Service (Class I) Rules of 1960 empower the Government to fix seniority of the officers by order of merit in the competitive examination or 'by any other method in its discretion'. Such power, the Government explains, is given to it so that there may not be any embarrassment resulting from the introduction of efficiency measures. It would be, therefore, desirable that some guiding principle for the exercise of this power were also incorporated in the rules. Approval by the Minister of an act of the Head of a Department also seems desirable.²⁴ Also under rule 10 (IV) of the Agricultural Produce Rules of 1956 the Government can terminate services of an employee after three months' notice without assigning any reason therefor. Wide power is also given under clause 3 of the Delhi (Control of Building Operations) Regulation, which is likely to cause hardship to those who want to construct a

20. S.R.O. 3419 of 1957.

21. G.S.R. 44t of 1958

22. *EG* S.R.O.s 1252, 1916 and 2258-A of 1957; 73 and 436 of 1958; *G.S.R.* 285 of 1958 and S.O. 446 of 1958

23. S.R.O. 251 of 1960.

24. Committee of Subordinate Legislation (Second Lok Sabha) Tenth Report, 15.

building in the controlled areas within the limits of the Delhi Municipal Corporation. For it provides that 'such bye-laws as prescribe any limitation within which sanction shall be granted or refused or which prescribe any limitation for the issue of a notice or within which any order on any application for the grant of completion certificate is to be passed or any other limitation provided therein, shall have no effect'.²⁵ It gives unguided but wide powers, the exercise of which may result in holding up sanction, grant of completion certificate, or insurance of notices any time without limitation. One might well realize that if application for grant of building sanction or a completion certificate is not disposed of in a reasonable time, the non-disposal is likely to cause hardship and loss to an owner and also impede building and development activity in the city.¹

Unusual Condition.

The requirement to disclose to the authorities one's membership of a firm, association, club, theatre, sports society, etc., looks unusual because it affects the individual's free choice to join or leave an association. The proviso to regulation 18 (1) (a) of the Coal Mines Regulations of 1957² requires an owner of a coal-mine to intimate to the Chief Inspector and the Regional Officer any change in the membership of firm or an association of individuals of which he has been a member. The regulation is an example of bad drafting, because it fails to convey the real intention of the Government. In fact, the intention here is not the disclosure of a person's membership to various associations but the disclosure of members or a change in the members of a firm.³

Fee.

Can a fee be charged by the authorities for anything done, without the express sanction of Parliament? It appears quite reasonable that since a fee is received for what has been done or actually spent, it is not a taxing item which might add to the revenues. Hence, it is not necessary to get the express sanction of Parliament. On the other hand it is said that the permission to charge fee must exist in an Act itself.⁴

There are cases not only of an unauthorized fee, but also of charging a heavy, discriminatory or unjustifiable fee.⁵ Rule 11 (2) of the Indian Wireless Telegraphy (Commercial Radio Operators, etc.) Rules of 1954 authorizes the Central Government to levy fee for the issue of duplicate copies of a certificate or licence, but it does not mention the rates of fee.⁶ Similarly, section 4 (2) (b) of the Prevention of Food Adulteration Rules of 1955⁷ leaves it to the Government to specify the rate of fee in respect of certificates of analysis of food issued by the Central Food Laboratory.

Retrospective Effect.

Retrospective effect to rules may or may not be intentional. The following is a case of unintentional retrospective effect. The rules for the Port of Cochin were published on 2nd February, 1957, but were brought into force from 30th January, 1957.⁸ Explaining the retrospection, the Ministry of Transport and

25. S.R.O. 3063 of 1957.

1. The Delhi (Control of Building Operations) Act, 1955 has now been replaced by the Delhi Development Act, 1957.

2. S.R.O. 3419 of 1957.

3. Committee on Subordinate Legislation (Second Lok Sabha) Fourth Report 13.

4. *Ibid.* First Report 13, 72, 131 ; Second Report 59 ; Fourth Report 42 ; Fifth Report 7 ; Sixth Report 22.

5. E.G. rule 26 (a) of the Representation of People (Preparation of Electoral Rolls) Rules ; clause 22 of the Fertilizer (Control) Order, 1957 as amended by G.S.R. 358 of 1958.

6. S.R.O. 793 of 1957.

7. S.R.O. 2106 of 1955.

8. S.R.O. 375 of 1957.

Communication stated to the Committee on Subordinate Legislation that the rules were expected to be published in the Gazette on 26th January, 1957, but as they were received late by the Press they were published in the following issue of the Gazette i.e., on 2nd February 1957. In this case the Ministry allowed claims for refund of charges or fees collected during the retrospective period.⁹ A similar case happened with an amendment to the rules regarding warehousing and retaining of goods. The S.O. 2523 of 1958 containing the amendment was published on 6th December, 1958 but it was given effect from the 1st December, 1956. In this case the Ministry of Railways explained that the notification was intended to be published prior to the date of its effect, but unfortunately there was delay in the despatch of the notification to the Press which resulted in its late publication.¹⁰

Intentional Retrospective Effect.

The other cases of retrospective effect are those where an action is intentional or for which there is no explanation. The S.R.O. 2249 of 1957 containing the Customs Duties Drawback (Potassium Citrate) Rules of 1957 were published on 6th July 1957 but brought into force from 1st July 1957. Similarly, the All India Services (Overseas Pay, Passage and Leave Salary) Rules of 1957, were given retrospective effect of about seven months.¹¹ The Ministry of Home Affairs which issued the rules justified its action on the ground that the officers who were likely to be affected were given intimation of the decisions contained in the rules by a memorandum dated 12th July 1956. Further, some decisions of the Supreme Court also allow retrospective effect in certain cases. But accepting the Ministry's explanation the Committee on Subordinate Legislation remarks that retrospective effect should not be given to any provisions by the rules unless the Act expressly allows it.¹²

Again the Central Government published on 31st August, 1957, a notification containing the amendments to the Schedule III of the Indian Administrative Service (Pay) Rules of 1954.¹³ These amendments were made effective from 4th April 1954. The All India Service Act of 1952 does not authorize retrospection to rules. On being pointed out by the Committee on Subordinate Legislation, the Home Ministry explained that the Indian Administrative Cadre Schedule of Assam had been revised with effect from 4th April 1954. But as the entries in Schedule III A and III B to the Indian Administrative Service (Pay) Rules of 1954 were to correspond to the entries in the I.A.S. Cadre Schedule, they had to be revised with effect from the date on which the revised Cadre Schedule had come into force. In its explanation the Ministry also mentioned its difficulty in giving the amendments effect from a date concurrent with its publication. Consultation with the State Governments and with other Ministries and drafting by the Ministry of Law—"all this process takes time and where decision to amend any particular rule has to be arrived at after consultation to the proper authority, it is the practice to issue executive orders and undertake formal amendments later. Where such formal amendments have to be given effect to from the date of the executive order or from an earlier date where such date is agreed to by all concerned, the formal amendments are given retrospective effect."¹⁴

9 Committee on Subordinate Legislation (Second Lok Sabha) Third Report 8

10 *Ibid* Sixth Report 19

11 S.R.O. 526 of 1957 rule 1 (3)

12 (Second Lok Sabha) First Report 121. In *Mohd Ghouse v The State of Andhra* (unreported Civil Appeal No. 133 of 1950) decided on 29th November 1950 the Supreme Court proceeded on the basis that certain civil service rules giving retrospective effect were not objectionable. In *Musaliar v M V Pooti* (1956) S.C.A. 259 (279) (1956) 29 I.T.R. 390 (1955) 2 S.C.R. 1196 (1) (1956) S.C.J. 323 A.I.R. 1956 S.C. 246, the Supreme Court upheld retrospective effect given to an Act by a notification on the ground that the circumstances of the case did not affect the principle disavowing the retrospective operation of a statute because there was not question of affecting vested rights.

13 S.R.O. 2726 of 1957

14 (Second Lok Sabha) Second Report 47

Ousting Courts by Rules.

There are several ways in which the jurisdiction of the Courts may be ousted. It may be done by giving finality to administrative decisions, by barring expressly any proceedings in Courts, by denying Courts to exercise jurisdiction except on a complaint made by the Government, or by giving no jurisdiction to Courts. The use of the word 'final' in rule 32 (3) of the Agricultural Produce (Development and Warehousing) Rules of 1956¹⁵ is ambiguous. It may mean that the decision of the National Co-operative Development and Warehousing Board in determining the status of an institution shall be final and there can be no further representation to other authorities including a Minister or a Court of law. Rule 6-A of the Cinematograph (Censorship) Rules of 1957¹⁶ validates the proceedings of the Film Censor Board, which reads that 'no act or proceeding of the Board shall be called in question on the ground merely of the existence of any vacancy in or defect in the constitution of the Board'.¹⁷ Similarly, rule 55 of the Mineral Concession Rules of 1949¹⁸ states that no Court shall take cognizance of any offence punishable under these rules unless upon a complaint made in writing by the Government within six months of the date of the commission of an alleged offence, which implies that no cognizance can be taken of an offence after the expiry of six months. Rule 88 of the Delhi Municipal Corporation (Election of Councillors) Rules of 1958 denies jurisdiction to a civil Court to question the legality of an action or decision taken by a Commissioner, Returning Officer or Presiding Officer.

The Committee on Subordinate Legislation thinks that curtailment of the jurisdiction of Courts should not be provided by delegated legislation; which, being a substantive provision, should be expressly sanctioned by Parliament. It is a fundamental duty of the Courts to see that the law and the rules made thereunder are followed properly. It is beyond the authority of the rule-makers to exclude the jurisdiction of Courts by inserting such provisions in their rules as noted above. If this were allowed to happen, there would be limitless transgression of the rule-making power by the Executive with no check by the Courts of law.¹⁹

Miscellaneous.

In addition to such irregularities there are others which consist in wide discretion,²⁰ sub-delegation²¹, penal provisions²² and conflict with the parent Act²³.

Scrutiny of the Draft.

Necessity for a careful scrutiny of the delegated legislation at the draft stage need not be emphasized. Delegated legislation at present is drafted and also scrutinized by the Ministry of Law. It therefore gives rise to the doubt that scrutiny by the Ministry may not be satisfactory for the following reason:

15. S.R.O. 2408 of 1956.

16. S.R.O. 84 of 1953.

17. See also rule 15 of the Working Journalists Wage Board Rules, 1956 (S.R.O.) 1769 of 1956.

18. As amended by S.R.O. 1681 of 1951.

19. Committee on Subordinate Legislation (2nd Lok Sabha) Second Report 7.

20. Clause 6, Appendix 4, the Telegraph Engineering Service (Class I) Rules, 1960 (G.S.R. 64 of 1960).

21. R. 41 of the Coal Mines Conservation & Safety Rules, 1954 (S.R.O. 3146 of 1954); rule 28 (3), 28 (4), Silk Board Rules 1955 (S.R.O. 662 of 1955).

22. Bye-law 7 (b) of the Bye-laws for Regulating the Grazing of Animals in the Cantonment of Ahmedabad (S.R.O. 351 of 1957); Also S.R.O. 14 of 1956; S.R.O. 1436 of 1957.

23. R. 32 of the Minimum Wages (Central) Rules, 1950, Also S.R.O. 416 of 1952; S.R.O. 1172 of 1953; S.R.O. 1681 of 1957.

Firstly, the scrutiny may be internal or external. Internal scrutiny is made by the very agent that acts. The Ministry of Law for example, drafts the rules and therefore, the scrutiny conducted by it may be regarded as internal. But such internal scrutiny though not insignificant is not quite sufficient. For it is liable to suffer from the vice of expectant attention and consequent oversight that is, while reviewing, the draftsman may unconsciously overlook or fail to catch a weak point.

Secondly, scrutiny implies that the reviewer has deeper knowledge, saner understanding and better information than the person whose act is reviewed. When reviewed by the person himself, the scrutiny does not ensure that, in the capacity of a reviewer, he is better and more competent than what he was as its draftsman.

Thirdly, scrutiny by the Ministry might suffer from the stereotyped vision of purely legal experts. It is because lawyers have more or less uniform approach to a problem and do not have the broader sociological outlook to examine whether the policy of the rules is consistent with that of the Act, and whether it is desirable at all in public interest. The policy aspect of a delegated legislation is sometimes completely ignored by the Ministry of Law.

Fourthly the Ministry of Law is merely an advisory body. For if an administrative department wants to promulgate a certain rule notwithstanding the advice of the Ministry of Law it can do so. In doing so the latter, of course, bears the responsibility.

Fifthly there are several safeguards both ante natal and post natal such as consultation, publication and laying but there is no machinery to enforce them. In the absence of such machinery it is left to the good will of the departments to apply them against themselves. In order to be effective, safeguards must be enforced by a third party. For how can a person find fault with and expose himself to public criticism and thereby invite trouble? The rule of introspection applies to moral and ethical spheres and not to state affairs. There is therefore, need for the supervision of consultation, hearing previous publicity, publication and laying so that these requirements should be observed in substance, and not in form only.

It has sometimes been suggested that in each State there should be a body like the Law Commission independent of the Governmental influence, to scrutinize delegated legislation.²⁴ In France it may be noted that *Conseil d'Etat* scrutinizes both parliamentary and subordinate legislation at the draft stage. It seems desirable to establish some agency other than the Ministry of Law for this purpose.

24 Ekbote, Gopal Rao *Delegated Legislation and its Supervision in Andhra Pradesh*, Indian Journal of Public Administration, July, September, 1962.

DOCTRINE OF RENVOI IN INDIA

By

S. R. BHANSALI.*

Ordinarily, when a person has the nationality and domicile of one country, it is the law of that country which governs matters regarding his title to movable and immovable properties, formal and essential validity of wills, divorce and legitimacy of children. Thus where an Englishman obtains the Indian nationality and is also domiciled in India, the distribution of his movables and immovables in India will take place according to the Indian Succession Act. There is, however, a little difficulty when a dispute is brought up in an Indian Court about an Indian national, who died in Germany, having obtained domicile of Germany and a question arises by the law of which country succession to his movables would be governed. Indian law refers to the German law as the law of domicile applicable in the case. The question now arises, whether distribution should be made according to German internal law as applied to the distribution of German movables of German subjects, domiciled in Germany or whether distribution should be made according to German law in the wider sense, which includes German Private International Law? If the reference is to the internal law of Germany, the distribution will take place according to the German statute of distribution and *renvoi* will not form part of the Indian Private International law. If the reference is to the German Private International law, then the following two solutions are apparent:—

(i) The German Private International law will refer back to the Indian law as the law of the nationality¹, and the Indian Court while accepting this remission may decide according to the Indian statute of distribution. This would be a case of simple *renvoi* or *Rückverweisung*; or

(ii) The Indian judge may don the mantle of his foreign colleague sitting in the German Court and decide as a German judge would do. The German law would refer to the Indian law as the law of nationality, but Indian law would refer back to the German law being the law of domicile of the deceased and this reference back will be accepted and German internal law applied, as German accepts *renvoi*¹. This would be a case of double *renvoi* (Rabel) or total *renvoi* (Dicey) or foreign Court theory (Cheshire) or *weiterverweisung*.

The term '*Renvoi*' literally means remission or reference backwards.² The doctrine of *Renvoi* raises one of the most controversial issues in Private International law. If the deceased person was of Pakistan nationality and domiciled in Germany and the Indian Court is to decide about succession to movables, then again there are two alternatives:

(i) Indian law refers to the German law as the *lex domicilii*, German law refers to Pakistani law as the law of nationality. The Court may apply Pakistan law of distribution and decide. This is *renvoi* in a wider sense; or

(ii) Indian law refers to the German law in the sense that Indian judge would don the mantle of his foreign colleague sitting in the German Court and decide what the German Court would have done in the case. German law refers to the Pakistani law which refers back to the German law, because according to Pakis-

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1. German Civil Code declared in Article 27 that 'If by the law of a foreign State of which laws are declared by Article 7 paragraph 1 (capacity), Article 13 paragraph 1 (marriage), Article 15 paragraph 2 (effect of marriage on property) Article 17 paragraph 1 (divorce), or Article 25 (Succession on death) to be applicable, the laws of Germany are to be applied, the latter shall be applied.'

2. In France the word '*Renvoi*' in Germany '*Rückverweisung*' in England and U.S.A. '*Remission*' and in Italy the term '*Rinvio indietro*' is used.

can Private International law *lex domicilii* governs succession to movables. The German Court would apply internal law which would therefore be the law applied by the Indian Court.

Thus there are references forwards and backwards unless it stops at one point in this endless circle. To cut this knot at a point some countries have accepted the doctrine of *renvoi* and have devised ways of making the reference to the internal law of the country at some stage. Like Germany, France³ accepted the reference back theory and applied its internal laws. Italy and U.S.A. have not recognised *renvoi* as part of their legal system. England has not accepted the simple or partial *renvoi* doctrine. Though there is no pronouncement by the House of Lords, the decisions of lower Courts suggest that double *renvoi* or foreign Court theory is acceptable to England.

The conception of *renvoi* was developed in the nineteenth century. It had precursors in certain decisions by the Parliament of Rouen of 1652 and 1663. These were discussed by the French jurist Froland who thus became the first author on the subject. In the nineteenth century the first decisions to apply *renvoi* (though without using the expression and without theoretical consideration) were three judgments by English Courts (1841 1847 1877)⁴ and one by a German Court in 1861⁵. The discovery of the *renvoi* problem was due to the violent discussion which the French *Fargo's case*⁶ aroused. Thereafter a great number of English cases followed though sometimes in dicta. Up to 1926 in England remission to English law was accepted and English municipal law was applied without considering *renvoi* further⁷. But from 1926 starting with the decision in *In re Annesley*⁸, remission to English law came to signify remission to English Private International law. Thereafter there were many cases in which English Courts followed the decision in *In re Annesley* without adding new arguments⁹. The meaning of *renvoi* has varied. In the earlier English cases it simply meant single reference to the municipal law of the forum of a third country. After 1926 it included a second remission or transmission if this led to the law which the foreign Court would have applied.

In general American law rejects *renvoi* and accepts the view that the law of a country means only the internal law, but allows exceptions in the case of questions of title to land or the validity of a decree of divorce which are decided in accordance with the entire *lex situs* or the entire *lex domicilii* respectively. In these cases both British and American Courts seek to reach whatever decision the foreign Court would reach to which their own connecting factor refers them¹⁰.

3 *Fargo's case* 10 Clunet 1883 64

4 *Coll et v Rivaz* (1841) 2 Cur 855, *Frere v Frere* (1847) 5 Notes on cases 593, *The Goods of Lacroix* L.R. (1877) 2 PD 94

5 Published in Seuffer's Archiv 14 No 107

6 Three cases in supra note 4 and *Laneville v Anderson* (1860) 2 Sw & Tr 24

7 L.R. (1926) Ch 692

8 *In re Ross* L.R. (1930) 1 Ch 377. *In re Askew* L.R. (1930) 2 Ch 259. *Collins v Att Gen*, (1931) 145 L.T. 551. *Re O Kneefe* (1940) Ch 124. *Kotav Nahas* (1941) PC 4013, *Re The Duke of Wellington*, L.R. (1947) Ch 506

9 *In re Schenck's Estate* 96 N.Y.S. 2d 652 (1950) Surrogate's Court of New York. *Matter of Zietz*, 198 Misc 77. 96 N.Y.S. 2d 442 (1950) and *Matter of Tallmadge* 109 Misc 696, 181 N.Y.S. 336 (1919), See *Gorisswold Renvol Revisited* 51 Harv L.R. 1165

In the above first noted case where U.S. national domiciled in New York died with immovable property in Switzerland and proceeds of which were deposited in New York, the Courts observed 'The rights which were created in that land are those which existed under the whole law of the situs and as would be enforced by those Courts which normally would possess exclusive judicial jurisdiction. This Court in making a determination of ownership must ascertain the body of local law to which the Courts of the situs would refer if the matters were brought before them. Such being the proper interpretation then this Court must in effect place itself in the position of the foreign Court and decide the matter as would that Court in an identical case.'

Much has been written on this doctrine by the English and Continental writers¹⁰, but still it is not easy to deduce acceptable principles. There are a few attempts by Indian scholars¹¹, but they have left out study of Indian cases altogether. In India Courts have followed the rules of English Private International law the main reason being that this country had moulded and modelled its laws on the principles of English jurisprudence; but after Independence it is neither necessary nor desirable to follow the same principles in all cases. The Supreme Court has given no decision on this doctrine and there are a very few decisions of the lower Courts. In *Indian and General Investment Trust Ltd. v. Ramchandra Mandaraja Deo*¹², Sinha, J., observed:

“The Courts in India are now at liberty to lay down their own rules with regard to Private International law and in this regard we are in a very happy position since we can adopt the rules laid down in various countries as accord best with our sense of justice, equity and good conscience. We can profit by their experience and avoid their errors.”

The need of the hour is, therefore, to evolve an independent system of Indian Private International law and this step should be towards achieving uniform and practicable rules in the international sphere. An attempt has, therefore, been made in this paper to examine the Indian view point and also to see whether the doctrine of *renvoi* should be accepted by the Indian Courts and what should be the general principles governing the doctrine of *renvoi* in India.

II

In a number of cases dealing with contracts, partnership, sale of goods, insurance, mortgages and the like the Indian Courts, when referred to the law of a foreign country have never had the slightest hesitation in applying the internal law of that country. Therefore, generally reference made by an Indian Court for the choice of law to a foreign legal system, has been to the internal law and not to the Private International law, the only exceptions being the cases concerning title to movables and immovables, foreign divorces, formal and essential validity of wills and legitimacy of children.

There are various theories put forward by various writers under different names.¹³ The reason for the development of these theories is that the world is

10. Cheshire, *Private International law* (5th Ed.) 61; Dicey, *Conflict of laws*, 64-84; Wolff *Private International law*, 2nd Ed. 186-205; Graveson, *Conflict of laws* 56-73; Schmitthoff, *English Conflict of laws*, 2nd Ed. 89-97; Westlake, *Private International law*, 5th Ed. 25-42 Batc, *Notes on the Doctrine of Renvoi* (1904); Mendelsohn Bartholdy, *Renvoi in Modern English law* (1937); Griswold *Renvoi Revisited*; 51 *Harv. L.R.* 1165; Falconbridge, *Conflict of laws*, 2nd Ed. Chapter^s 6 to 10.

11. K.D. Chandi, *Renvoi in English Law*, *Luck Law Journal* (1941); Paras Diwan, *The Problem of Characterization and the Doctrine of Renvoi in Private International law*, (1954) *S.C.J.* 191 at page 230.

12. *A.I.R.* 1952 Cal. 508.

13. Cheshire discussed two theories: The Theory of *Renvoi* and the Foreign Court Theory Dicey discussed three theories: The Internal Theory, the Partial *Renvoi* Theory and the total *Renvoi* Theory; Lorenzen discussed under two names: The Mutual Disclaimer of Jurisdiction Theory and the Theory of *Renvoi* Proper; Falconbridge discussed under the three names: Ping Pong

guided by two different kinds of principles, accepted or rejected by the different countries. Countries under the former British Colonial rule and some other countries decide cases about distribution of properties, validity of wills or question of divorce and legitimacy on the principle of *lex domicilii*, whereas countries under the former Italian, French and German colonial rule decide according to *lex patriæ*. Had there been uniformity of rules in all countries, there would have been no problem like that of *renvoi*. The Indian law is sovereign over all matters occurring within the Indian territory, but from the point of international comity, obligations and securing a single system of succession, legitimacy, etc. it resigns its ordinary jurisdiction in favour of such country which favours the principle of *lex patriæ*. The reason for the acceptance of the theory of *renvoi* is that the rules of Private International law are to be understood as not only incorporating the rules of internal law of the foreign country but also its rules as to conflict of laws. I would discuss the doctrine of *renvoi* under the two following headings:

(1) Back Reference Theory, and

(2) Forward Reference Theory

Back Reference Theory.

As noted above the problem of *renvoi* arises only in case of a conflict between the rules of Private International laws of different countries, and some way may be found towards general agreement, if the different kinds of conflicts are analysed and distinguished in relation to the same question. If the question before the Indian Court is about the distribution of movables of an Indian national who died in Germany having obtained the German domicile, the Indian Court would refer to German law being the *lex domicilii*.¹⁴ If the reference to German law means, reference to whole of the German law, including the Private International law, then the Indian judge would find that according to German law it is to be distributed according to the law of Nationality of the deceased. There is thus a back reference to the Indian law. But this back reference to *lex patriæ* will not be accepted by the Indian Court, because partial *renvoi* is not acceptable in India.¹⁵ Where the Court of a country, e.g., Germany or France which is seised of the matter accepts the remission and applies its own municipal law, it recognizes the doctrine in its simplest form. This may be best illustrated by the well-known *Fargo's case*.¹⁶

Fargo, a Bavarian national, domiciled in France, died intestate in France, leaving movables there. According to French law the *lex patriæ* governed the succession to his movables, therefore, a reference was made to the Bavarian law, but by Bavarian law succession to movables was governed by the law of domicile. The French Court accepted the remission and applied French law as the law of domicile, which had the effect of firmly establishing *renvoi* as part of the French law.

Theory, the Foreign Court theory and the Vested Right Theory; Von Bar and Westlake have discussed under the name - Theory of Desistment or Mutual disclaimer of Jurisdiction Bentwitch has accepted only one Theory *i.e.*, the Theory of *Renvoi* Proper.

14 Section 5 of the Indian Succession Act, 1925 lays down :

(i) Succession to immovable property in India of a person deceased shall be regulated by the Law of India, wherever such person may have had his domicile at the time of his death

(ii) Succession to movable property of a person deceased is regulated by the law of the country in which such person had his domicile at the time of his death.

15. *Supra* note 14

16. 10 *Clunet*, 1883, 64,

In the above case there was a reference from country A to country B and then back from B to A. The back reference theory appears in its simplest form. A case may occur, however, where the question before the Indian Court might be to decide about the distribution of movables of a Pakistani national who died in Germany having obtained domicile of Germany. The Indian Court would refer to German law being the *lex domicilii*. But German law would again refer to the *lex patriæ*, i.e., Pakistani law. But this transmission to *lex patriæ* will not be accepted by the Indian Court because partial *renvoi* is not acceptable in Pakistan. The Indian Courts for the distribution of movables will take into consideration the *lex domicilii* and not the *lex patriæ*. Domicile is not the same as nationality. It may happen in many cases that a person owing allegiance to a State may have his domicile in that State, but the fact that an individual is a national of a country does not necessarily imply that he is having his domicile in that country. Thus a subject of France or Italy may have his domicile in India and vice-versa. To suppose that for a change of domicile there must be a change of national allegiance is to confound the political with the civil status and to destroy the distinction between *patriam* and *domicilium*. A man may change his domicile as often as he pleases, but not so his nationality. *Execure patriam* is beyond his power.¹⁷

In Private International law relating to status, capacity and rights of individuals, when questions arise as to what law should govern a person whose nationality differs from domicile, divergent views have been voiced by jurists. The conflict between the application of the law of the country in which a man was born and the law of the country to which he has taken himself with a view to reside there permanently, was there even during the days of Imperial Rome on account of various communities having been governed by different laws within the Roman Empire. Even after the fall of the Roman Empire and the springing into existence of various nations almost independent of one another, on account of the loose knitting of the nationals of one country by any one system of law and the divergent systems adopted in various divisions of the same country, it became necessary to apply to a person residing within a particular division, the law of his domicile even though he may be hailing from elsewhere. But the tendency for a uniform code being designed for regulation of the rights and relations of citizens of the same country, in whatever part thereof they may arise, was becoming more and more pronounced with the development in the ideas of patriotism and nationhood with the result that when we come to the Code Napoleon, we find this tendency receiving the State's imprimatur leading to nationality being preferred to domicile. The impetus for recognition of nationality as the test for operation of civil rights as against domicile was further strengthened by the clarion call of the Italian political philosopher Mancini who declared with a cogency of reasoning only equalled by the trenchancy of his language, that no man residing under the protection of one country with its own system of law should be allowed to be governed by any other system to whichever country he may belong. This was alright so far as a single State, small in itself, like Italy was concerned. But to apply it to a nation like the English which was throwing out its tentacles of imperial aggrandisement over vast regions of the globe, comprising countries having different codes and systems of jurisprudence was in the nature of things incongruous and absurd. We, therefore, find in England a tendency almost persisting from the very beginning to abandon the test of nationality in favour of domicile for the regulation of private rights of persons. It may, therefore, now be asserted that so far as English law and the laws of the countries modelled on English jurisprudence are concerned, domicile is preferred to nationality and one now finds the countries of the world almost equally divided as regards the preference for the one or the other. So far as India is concerned, mainly modelled and mould-

ed as its laws are, on the pattern of English jurisprudence, the test of domicile and not of nationality has been adopted to govern the status of persons and their rights and rules of succession as regards personality and movables.

Before proceeding further to discuss the 'Forward Reference Theory', a brief review of the various theories explained and justified by eminent writers may be given.

The "Theory of Desistment or Mutual disclaimer of Jurisdiction" was first propounded by Von Bar and later accepted by Westlake with greater support. According to Von Bar, all rules of conflict are in reality those by which one State, for the purpose of administering private law, defines its own jurisdiction and the jurisdiction of foreign States. With this assumption he said, "Due respect for the sovereignty of State X should forbid the State Y to ascribe to State X a jurisdiction which that State X declines." He presented his thesis at a meeting of the Institute of International law, held at Neochetal, in 1900 which may be summarised as follows¹⁸:

1. Every Court shall observe the law of its own country as regards the application of foreign laws.

2. Provided that no express provision to the contrary exists the Court shall respect—

(a) the provision of foreign law which disclaims the right to bind its nationals abroad as regards their personal status, and desires that personal status shall be determined by the law of the domicile, or even by the law of the place where the act in question occurred.

(b) the decision of two or more foreign systems of law, provided that it be certain that one of them is necessarily competent, which agree in attributing the determination of a question to the same system of law.

Westlake also accepted this theory. He was of the opinion that the difference between internal law and Private International law belonged only to the science of law, but did not actually exist. Von Bar and Westlake have, therefore, concluded that where there is a conflict between the law of the forum and law of the foreign country, the law of the forum shall be applicable. According to them at the time of conflict between these two laws, there is a vacuum which has to be filled by the internal law of the forum, and not by any remission or transmission or considering oneself as sitting in the Court of the foreign country. The theory of Von Bar and Westlake is open to the following criticism¹⁹:

(1) Contrary to the law of Renvoi proper, the theory leads to the application of the internal law of the forum, in practically all cases in which the rules of Private International law of the country differs from those of the country whose law has *prima facie* been adopted and incorporated.

(2) The starting point of this theory, is that a legislator, who adopts the law of domicile to determine capacity, is not interested in his subjects abroad and does not legislate with respect to them, and that a legislator who adopts the law of nationality in his system of conflict of laws is not interested in foreigners domiciled in his territory and does not legislate in respect of them. This rests upon an erroneous assumption. It would be absurd to say that the provisions of the Italian Civil Code do not apply to an Englishman domiciled in Italy.

(3) Neither Von Bar nor Westlake denies the competency of a State to extend its jurisdiction over a matter which another State claims for itself and yet their theory rests upon the fundamental proposition that due respect for the State X makes

¹⁸ 18 *Annuaire de l'Institut de Droit International*, 41; Westlake, *Private International Law*, 5th Ed 35; Paras Diwan (1954) *SCJ*, 191 at p. 221.

¹⁹ K.D. Chandi, 97

it improper for the State Y, to assign to the State X, a jurisdiction that State X declines, as if, it were not a greater offence to deprive the State X, of a jurisdiction which it claims, than it would be to assign to it a jurisdiction which it does not claim.

(4) The fundamental error of the theory consists in the assumption that it is possible for the State Y to bring its own jurisdiction into perfect accord with that of other States, so that there will be no infringement of their jurisdiction. But this is impossible and will remain so, as long as States differ as to rules of Private International law. Each State is, therefore, obliged to adopt its own rules without deferring to those of other States.

(5) This theory lacks support from a historical point of view. Westlake says that there is an inseparable link, between the rules of Private International law of a country and its internal or territorial law, so that according to the real intention of the legislator the former must be deemed to define the limits of the latter's application. This is not historically correct. In most cases no rule of Private International law can be found side by side within the rule of Municipal law in statutes meant by the legislator to establish the latter.

The theory of *renvoi* in the form put up by Von Bar and Westlake is, therefore, untenable.

The theory of *renvoi* proper has been accepted by Bentwich. Bentwich accepts *renvoi* in its remissional sense and not in the wider sense. His theory accepts the application of the internal law of the forum wherever there is a conflict between the Private International law of the two countries. Bentwich advanced the argument in this manner²⁰:

"The *renvoi* is in principle a reference back not to the whole law of the foreign country including its different rules of Private International law but simply to its internal law. Suppose a case where the *lex fori* (hereinafter called A) submits the matter to *lex domicilii* (hereinafter called B and B refers the matter back to A as the law of nationality. A accepts the *renvoi*, and applies its own law. If we regard the first principle, we see that what has happened is this. Law is primarily sovereign over all matters occurring within the territory and so A would ordinarily apply to succession. A, from motives of international comity and to secure a single system of succession, resigns its ordinary jurisdiction to B. But B, by reason of its special juristic conceptions, does not take advantage of the sacrifice or accept jurisdiction. A's primary jurisdiction consequently is properly exercised and there is no ground for A to decline to accept the renunciation of B, since it thereby puts into operation its fundamental principle of regulating every matter within the territory."

The theory is open to following criticism:

(1) According to above theory the basis of Private International law is comity and reciprocity. But this is not correct. Rules of Private International law are not based on comity alone. 'Considerations of justice and of expediency have played a very important part in the adoption of specific rules in conflict of laws.'²¹

(2) Secondly the principle of domicile was not accepted by the Anglo-American jurisprudence on the basis of reciprocity; had it been so, they would

20. Bentwich : The law of Domicile in its relation to Succession and the doctrine of *renvoi*.

21. Lorenzen : Selected Articles on Conflict of laws.

have accepted the principle of nationality, but that would have never suited the Anglo-American needs.²²

Forward Reference Theory.

As has been stated above the doctrine of *renvoi* implies two notions: the *Ruchverweisung*, i.e., the notion of back reference (or remission of the *renvoi* in its narrow sense or *renvoi proper*) and the *Weiterverweisung*, i.e., the notion of forward reference (or transmission or double *renvoi* or *renvoi* in its wider sense). If the question before the Indian Court is to decide about the distribution of movables of an Indian national, who died domiciled in Germany, the Indian Court would refer to German law being the *lex domicilii*. If the reference to German law means, reference to whole of the German law including Private International law, then the Indian judge would find that German law has referred back to Indian law being *lex patriæ*. But since the back reference theory is not acceptable in India, the Indian judge would refer again to the German law being *lex domicilii*. Since German law accepts the remittances²³, the Indian judge would don the mantle of his foreign colleague sitting in the German Court and would decide as the German Judge would do. The Indian Judge would apply the internal law of Germany for the distribution of movables, which the German judge would have applied. Expert evidence, must be adduced in the Indian proceedings to show what a German judge would in fact do. In other words, the Indian judge decides on evidence of persons skilled in German law and decides as it would if sitting in Germany. This shows that forward reference theory or *renvoi* in its wider sense is acceptable to Indian law.

If in the above illustration the person who died domiciled in Germany was of Pakistani nationality, and the Indian Court is to decide the matter, then the Indian Court would refer to German law being *lex domicilii*, but the German Private International law would refer it to Pakistan law being *lex patriæ*. But the Pakistan Private International law would not accept this remittance and would again refer to *lex domicilii*. The German law would accept this remittance. The Indian judge would, therefore, don the mantle of his foreign colleague sitting in Germany and apply the German internal law, with the help of expert evidence and would decide as it would, if sitting in Germany. The second illustration of the Indian Succession Act, 1925 favours such a course.²⁴ In this illustration it has been laid down that the succession to the movable property of an Englishman domiciled in France, but dying in India is regulated by the French law with reference to succession to movable property. There are three problems which may arise in this connection. They are—

(i) To find out whether the man is domiciled in France, if so, is it the law of France or England or India, that is to be applied.

(ii) Secondly, if it is decided that he is of French domicile according to the English or Indian law, but not according to the French law, can the French law be made applicable to succession to the movable property. The question of naturalization and allegiance²⁵ and a claim to the citizenship in one country is not inconsistent with the acquisition of domicile in another country.²⁶

22 Paras Diwan, 226

23 Supra note 1.

24 Section 5 (2)—illustration (ii) of the Indian Succession Act, 1925, "A an Englishman having his domicile in France, dies in India, and leaves property, both movable and immovable in India. The succession to the movable property is regulated by the rules which govern, in France the succession to the movable property of an Englishman dying domiciled in France and the succession to the movable property is regulated by the law of India

25 *Udny v Udny*, L.R. 1 Sc & Div 441.

26 *Stanley v. Berner*, 3 Hagg Ecc 373.

(iii) Thirdly, if it is decided that he is of French domicile, the question remains, which French law is to apply French Municipal law applies foreigner's law of nationality for distribution of movables and in this case English. But the English law refers back to the French law and the problem arises, will the French law accept the reference back?

The case of *Annesely*²⁷ is an important decision on some of the problems on the second illustration under section 5 (2) of the Indian Succession Act. In that case an English Woman was domiciled at the time of her death in France according to the principles of English law, but was domiciled in England in the eyes of French law, since she had never obtained the authorisation of the Government under Article 13 of the French Civil Code, which was necessary for the acquisition of French domicile. Her testamentary dispositions were valid by English internal law, but invalid by French internal law, since she had failed to leave two-thirds of her property to her children.

The question, therefore, was, which law would determine the intrinsic validity of the will? The English Private International law referred the matter to French law as being the *lex domicilii*, which in its turn referred by its own rules to English law. The French Court, however, found itself referred back by English Private International law to French law. The English Court was satisfied on the strength of the decision in *Fargo's case*²⁸, that the French Court would accept this remission, because partial *renvoi* is recognized in France and would apply French internal law. The judgment of Russel, J., throws a flood of light on the question in controversy and is as follows²⁹

"I accordingly decide that the domicile of the testatrix at the time of her death was French. French law accordingly applies, but the question remains, what French law? According to French municipal law the law applicable to a foreigner not legally domiciled in France is the law of that person's nationality, and in this case British. But the law of that nationality refers the question back to the French law, the law of domicile, and the question arises will the French law accept the reference back, or *renvoi* and apply French municipal law?

"Upon this question arises acute conflict of expert opinions. Two experts took the view that the *renvoi* would not be accepted but that the French Courts would distribute the movables of the testatrix in accordance with English municipal law. One expert equally strongly took the view that a French Court would accept the *renvoi* and distribute in accordance with French municipal law. I must come to the conclusion as best as I can, upon this question of fact, upon the evidence after considering and weighing the reasons given by each side in support of their respective views. It is a case rather of views expressed by experts as to what the French law ought to be than what it is.

"In these circumstances and after careful consideration of the evidence of experts called before me, I have come to the conclusion that I ought to accept the view that according to French law the French Courts in administering the movable property of a deceased foreigner, who according to the law of his country is domiciled in France and whose property must according to that law be applied in accordance with the law of the country in which he was domiciled, will apply French Municipal law and that even though the deceased had not complied with Art. 13 of the Code."

27. See supra note 7.

28. See supra note 3.

29. See supra note 27.

Prof. Cheshire is of the opinion that the Court had reached a wrong conclusion as to French Private International law because in 1926 the French Courts would have applied the English law not because it was the *lex patriæ*, but because the testatrix had domicile of England in the opinion of the French Courts. This may be so, but this does not detract from the authority of the case as a support for *renvoi*. Justice Russel added a dictum, "that speaking for myself I would like to reach the same conclusion by a more direct route along which no question of *renvoi* need be considered at all." But he felt bound by precedent to reach the decision by the more devious route involving *renvoi*.³⁰

I would now turn towards the application of doctrine of *renvoi* in Indian cases on the subject concerning the validity of wills, title to foreign land, title to movables and matters concerning marriage or divorce.

Validity of Wills.³¹

The Indian rule is that the formal validity of a will is determined by the *lex domicilii*. If any will is valid by the *lex domicilii*, the Indian Court would accept that as valid, though it may not be so by Indian principles. In *Ram Lal v. Chanan Dass*³², a testator died domiciled at Nairobi (Kenya) leaving property in Kenya and India. The will was written in Urdu. The Supreme Court of Kenya granted an application for probate in favour of the petitioner. The grant contained a copy of the Urdu will and then a translation into English. According to the law of that country the original will was retained by the Kenya Court. The question arose whether the probate granted by the Nairobi Court could be accepted in India when the original will was not filed by the petitioner before the Indian Court.³³ The Court referred to the English practice. The English Court of probate would have dispensed with the production of the original will owing to its having been deposited in the Nairobi Court. Monroe, J., therefore, accepted in this case a copy of the will issued by the Supreme Court of Nairobi.

A grant of probate to wills should not be denied on the ground of formal invalidity, if the instrument is formally valid according to Private International law though not according to the Municipal law of the governing legal system.³⁴ According to Indian law copy of the will was not valid and on that basis probate could not be granted. According to Kenya's law the original will could not be released. The Court referred to English law and held that an English Court seized of this matter would have accepted a copy of the will, if it was valid under the *lex domicilii*. Thus the instrument valid according to Private International law was held valid by the municipal Court. In this case, though there was no clear acceptance of the principle of *renvoi* by the Indian Court, since the Court had accepted the decision of the Court of domicile and acted accordingly, there was a tacit acceptance of *renvoi* in that sense.

30 See supra note 27.

31. English cases on the subject are *De Bonneval v De Bonneval*, (1838) 1 Curt. Ecc. 856; *Collier v Riaz*, (1841) 2 Curt. Ecc. 855; *Frere v Frere*, (1847) 5 Notes of cases 593, *Bremer v Freeman*, (1857), 10 Moore P C 306. In the *Goods of Lacroix*, (1887) 2 P D 94; *In re Annisley*, (1926) Ch. 692.

32 A.I.R 1938 Lah 349

33. Section 228 of the Indian Succession Act, 1925 empowers the Court when a will has been proved and deposited in a Court of competent jurisdiction situated beyond the limits of India, and a properly authenticated copy of the will is produced to grant letters of administration with a copy of such annexed will. This section is silent about production of the copy of the grant of probate.

34 Cheshire, 127; *Collier v Riaz and Frere v Frere* Supra, note 31; *Ross v. Ross*, (1930) 1 Ch. 377.

A clear acceptance of the doctrine of *renvoi* is to be seen in *Sukumar Banerji v. Rajeswari Devi*³⁵. In that case a testatrix died domiciled in French territory at Chandernagore. According to the will her movable property lying in India was to be distributed by 'B', who was her brother. Since at the time of making the will, 'A', the testatrix, was lying sick and was not capable of signing her name or giving thumb impression, it was written by the Notaire of French Chandernagore, and subsequently signed by 4 witnesses and the Notaire. Such will was valid according to Article 972 and 973 of the Code Napoleon. B filed an application in the Indian Court for the grant of letters of administration. According to the Indian law, a will must be proved and deposited in the foreign Court³⁶, while according to the French law the notary had the function of authenticating an act in law, such as the will, and no Judgment is necessary to prove the genuineness or validity of a document made out by the Notary or for the purpose of being executed. Thus according to French law the will is valid, but according to Indian law a foreign will neither signed by the testatrix nor proved in the foreign Court is not valid. But according to Indian Private International law, which is based on the English law³⁷, if the will is valid according to the law of the domicile of the testatrix, it is valid by the law of this country. Costello, J., therefore, quoted a passage from *Bhaurao v. Lakshmi Bai*^{38, 39}.

"but where a foreign will has not been so proved, the judge will have himself to take evidence as to the due execution of the will, according to the law of the country in which the testator was domiciled, in cases where the property in respect of which probate is sought is movable or personal property, and must, if necessary, satisfy himself by evidence as to the law relating to the execution of wills in force in such country."

The evidence given by the expert, i.e., the Notary was that the will was a valid will according to the French law and it was not necessary to prove it before the Court.

This case would show that the Indian Court referred to the French law being *lex domicilii* for the validity of the will. According to French Private International law *lex patriæ* determines the validity of the will, but according to the Indian law it was not a valid will. The Indian Court, therefore, referred to the English law as to what English law would have done in the similar case. The English Private International law would have accepted it as valid, if it was valid under the *lex domicilii*. The Indian Court, therefore, referred back and with the help of French experts applied the French law and held that the will was a valid one. The Court observed:

"In our opinion, in order that justice may be done in cases, such as the present one, it is necessary and desirable that a reasonable interpretation should be given to the expression 'proved and deposited' so as to bring the practice in this country as far possible into line with the practice obtaining in England. To do otherwise would be to create endless difficulties."

35. A.I.R. 1939 Cal. 237.

36. Section 228 of the Indian Succession Act, 1925 ; See Supra note 33 also.

37. Halsbury's laws of England, Vol. 14, p. 202 para 331, "Where a person dies domiciled abroad, and it becomes necessary to prove his will upon proof that the testator was domiciled in the country, in question, and that either the foreign Court has adopted his will as a valid testament or that his will is valid by the law of that country."

38-39. I.L.R. (1896) 2 Bom. 610.

Although in this case, Costello, J., had not discussed the renvoi doctrine and had not enquired whether renvoi was part of the French law, it is clear that the Indian Court decides the nature of foreign law on evidence tendered and in this case the evidence was that the French Courts would hold the will to be valid by applying the national law. Therefore, the Judge had no necessity to ask whether renvoi was part of the French law.

The above principle of disposal of movable properties is not applicable in the case of immovable properties. The validity of a will which purports to dispose of immovable property in India must be tested by the rules applicable to the execution of wills in India. In *Bhaurao v. Lakshmi Bai*⁴⁰, a testator, a Baroda subject executed a will in Baroda about immovable property in British India (Belgaum). The petitioner applied for probate of that foreign will in the Court of the District Judge Belgaum. The District Judge rejected the application on the ground that the will must be first proved by the law of nationality before the Indian Court could take any action. On appeal the Bombay High Court rejected this contention of the lower Court and held that the law of British India is applicable to the will. Farran, C.J., observed that the provision in section 56 of the Probate and Administration Act, 1881 was general and operated irrespective of the place where the will was executed or of the nationality of the testator or of the place of domicile.

Title to Foreign Land.⁴¹

The Indian law is that succession to the estate of a person is governed by the *lex situs* in the case of immovables and in the case of movables by the law of his domicile.⁴² Again the 'Courts in India have no jurisdiction to determine questions of title in respect of immovable properties in foreign countries or to direct a division thereof. Further when such a Court has no jurisdiction to determine any matter in controversy such as the question of title in respect of the foreign immovable property it has no jurisdiction to refer it for the determination of the arbitrators'.⁴³ Hence 'the country in which the immovable property is situated' has, by the very nature of things a permanent and exclusive physical control over it, therefore, it would be a realistic approach if the title to such property is determined by a reference to the whole of the *lex situs* i.e., including the rules of conflict of laws'.⁴⁴ Although in the Private International law succession to immovable property is to be governed by *lex situs*, in the case of Hindus migrating from one province to another province governed by different laws the succession will be governed not by the *lex situs*, but by the personal law of the party. A Hindu family, migrating from one part of India to another, is presumed to continue to observe the law of the school to which it belongs. Thus in *Smt. Ram Parhati Kumari Devi v. Jagdis Chaudhar Bhaba*⁴⁵ 'A' of Mitakshara School, died leaving two widows and a half brother. One widow claimed the ancestral estates of her husband situated in the Jungle Mehals of Midnapur, where Dayabhaga law governed the succession. The half brother claimed that the Mitakshara law would govern the succession to the estate and under that law he was entitled. The widow's claim was that upon the death of her husband, who like his ancestors had lived under and was governed by the Bengal School of Hindu law, she became entitled to the estate. The defendant argued that his ancestors were

40 English cases on the subject are *In re Ross*, L.R. (1930) 1 Ch. 377, *In re The Duke of Wellington*, L.R. (1947) Ch. 506.

41 *Vishwanathan v. Abdul Wazid* A.I.R. 1963 S.C. 1.

42 *Nachuappa Chettiar v. Subramaniam Chettiar*, (1960) 1 An.W.R. (S.C.) 101 (1960) 1 M.L.J. (S.C.) 101 (1960) 1 S.C.J. 416. A.I.R. 1960 S.C. 307.

43 Paras Diwan, 230.

44 L.R. (1901) 29 I.A. 82.

originally inhabitants of Dharanuggur in the N. W. Provinces, where the Mitakshara was in force, that they came from there and took possession of the lands now in question, that since then their family ceremonies had been performed according to the Mitakshara law.

The Calcutta High Court held that Mitakshara law governed the succession. The High Court observed:

"Where a family governed by one law migrates into a country where another law of inheritance is prevalent, the supposition is that they carry their own personal law with them, and strong proof is required from the person making the assertion that they have abandoned the one and adopted the other."⁴⁵

The Privy Council agreed with the Calcutta High Court and held that succession to immovable property was to be governed by Mitakshara law, and the half brother was entitled to the estate in preference to his widows. The Dayabhaga law here referred to Mitakshara law of N. W. Provinces. According to Mitakshara law, it governs such cases if the person following such law has not relinquished it. It, therefore, referred back to the whole of the Hindu law. The Privy Council, therefore, considered whether the family while remaining in a foreign country had relinquished its personal law or not. It noted:

"When regard is had to the evidence relating to ceremonies at marriages, births, and shrads, it cannot be disputed that there is a strong body of affirmative evidence in support of the continuance and against the relinquishment of Mitakshara in this family."⁴⁶

Since the person had not relinquished the Mitakshara law, Dayabhaga law referred to the Mitakshara law and applied the same.

Similarly in *Balwant Rao v. Baji Rao*^{46, 47} a Maharashtrian Brahmin domiciled in the Bombay Presidency died in 1868, leaving immovable property in the Central Provinces. On his death his daughter succeeded to his property. She transferred some portions of the property. On her death her sons sued to set aside the alienation, on the ground that she had only a limited estate. According to C. P. Law, where the property was situated, she would have got a limited estate, but under the Bombay law an absolute estate. As noted above succession in Hindu law is governed not by *lex domicilii* or *lex situs* but by the personal law. The Calcutta Court referred to the C. P. Hindu law, according to which if a family had migrated to that province, but continued to observe another school of Hindu law, succession to immovable properties would be governed by that law. The C. P. school, therefore, referred to the Bombay School. On evidence it was held that the family continued to observe the Bombay school. Lord Dunedin in the Privy Council, therefore, held that the family of her father and his ancestors were domiciled in Bombay and there was no renunciation of the law of that Province, when he migrated from it and that the daughter took an absolute estate under the law of the Bombay Presidency.

Again in *Mailathi Anni v. Subbaraya Mudaliar*⁴⁸, a French subject, Hindu by religion, left certain immovable properties in French India, leaving a step-daughter

45. See supra note 44.

46-47. L.R. 47 I.A. 213 : 39 M.L.J. 166 : (1920) I.L.R. 48 Cal. 30 (P.C.) : A.I.R. 1921 P.C. 59.

48. (1901) I.L.R. 24 Mad. 650 : 11 M.L.J. 309.

and widow. According to French Hindu custom, a widow who had no male descendants could take all his property absolutely as if it were *stridhan*. The widow took the French property. She later on acquired an Indian domicile. Subsequently when she visited French-India, she executed a will in favour of her brother. After her death the step-daughter claimed heirship. The brother claimed a succession certificate on the basis of the will.

A question arose whether the widow took an absolute estate or only a limited estate. The immovable property was situated in French territory. The widow was a French national and Indian domicile. According to Indian Hindu law a widow was allowed only a limited estate. Since she was a French national, her Indian domicile did not change the character of her estate. The Indian Court, therefore, referred to the French law. The evidence of expert witness was taken, who proved that by French law, the testatrix on the death of her husband became by inheritance absolute owner of his property. The Court accepted this and applied the French law, by which the widow took an absolute owner. The will to her brother was, therefore, held valid.

Ordinarily *lex domicilii* governs the matter concerning status of parties, but for purposes of succession to the immovable properties of Hindus or Moham-madans, the personal law governs the matter. In the case of Parsis, etc., to whom the Indian Succession Act, 1925 is applicable, the *lex situs* governs succession to immovable properties in India. In *Ratan Shaw v Bamanji*⁴⁹, A, domiciled in Baroda State married B, whom he divorced by mutual fargats according to custom prevalent among Parsis in that State. After this divorce 'A' married 'C' and after her death married 'D'. 'A' left certain immovable properties in British India. According to Baroda law 'D' and her heirs were entitled to succeed to the properties in British India, but divorce by mutual fargats was unknown to British India. Since succession to immovable properties in British India of the deceased Parsi was to be governed by *lex situs*, Wadia, J., held that the divorce was not valid and would not be recognised by the Indian Courts. 'B', therefore, continued to be the wife of 'A'. Even though status would ordinarily be determined according to the law of domicile and such status would be recognised by British Courts, yet for the purpose of succession to the immovable property in British India of a deceased Parsi resident of Baroda State, the law applicable would be that of British India, according to which a divorce among Parsis by mutual fargats or releases was not a valid divorce and would not be recognised by the British Indian Courts, though it might be valid in Baroda State.

In my opinion, if the proceeds of the properties would have been deposited in the Baroda Court and the Baroda Court would have dealt with the matter, it would have simply followed the Indian decision. The Baroda Judge would have referred to the *lex situs* for the succession to immovable properties and from the evidence of experts in Indian law, would have held that B continued to be the wife of 'A' and would thus be entitled to succeed. In fact this case is an illustration of the nature of the doctrine of *renvoi* with relation to title to immovable properties.

The Privy Council had occasion⁵⁰ to consider the *renvoi* doctrine. The complexity of this case was to ascertain the legal system that governed the order of intestate succession to immovable property in 'P' State, whose law provided that it would be governed by the *lex patrie*, if the deceased owner was neither a citizen nor member of one of the religious communities of that State. It also provided that if the *lex patrie* referred to the *lex situs*, then the *lex situs* should be applied.

49 A.I.R. 1938 Bom. 239

50 *Kotia v Nahar*, I.L.R. (1941) 28 P.C. 139 : 197 I.C. 555

by the 'P' State. In other words, there was a statutory obligation to accept the doctrine of 'partial renvoi'. The deceased owner in that case was neither a citizen nor a member of one of the religious communities of 'P' State, but a national of 'L' State. The rule of 'L' State provided that succession to land situated outside the State shall be governed by the *lex situs*. The Privy Council held that succession would be governed by the law of 'P' State.

Again in *Abdurahim Haji Ismail Mithu v. Hatimabhai*⁵¹, 'A' who was member of the Indian sect known as Memons (Hindu converts to the Muslim faith) went to East Africa from Cutch (India) and settled at Mombasa with hundreds of other Memons. After the death of 'A', his son claimed under the Hindu law, while the widow claimed under the Muslim law $\frac{1}{4}$ th of her husband's estate. At Mombasa the succession to Mahomedans was in general governed by the Mahomedan law, although it would probably be open to immigrants to prove that they have brought with them and preserved a custom establishing a special law of succession. But in either case succession to immovable property was to be governed by personal law and not by the *lex situs*.

The Court of Appeal for Eastern Africa held that Memons being a Mahomedan sect, less stringent proof was required of the discontinuance of a Hindu custom, where they had come into a country in which Mahomedan influence was powerful than would be required in the case of Hindus seeking to prove the discontinuance of a Hindu custom. Their Lordships in the Privy Council agreed with the Court of Appeal and observed:

"Where a Hindu family migrate from one part of India to another, *prima facie* they carry with them their personal law, and, if they are alleged to have become subject to a new local custom, this new custom must be affirmatively proved to have been adopted, but when such a family emigrate to another country, and being themselves Mahomedans, settle among Mahomedans, the presumption that they have accepted the law of the people whom they have joined seems to their Lordships to be one that should be much more readily made. All that has to be shown is that they have so acted as to raise the inference that they have cut themselves off from their old environments. The analogy is that of a change of domicile on settling in a new country rather than the analogy of a change of custom on migration within India."⁵²

The law relating to migrating families has lost most of its importance subsequent to the passing of the Acts in 1955-56 including the Hindu Succession Act, 1956. Still the Hindu law of Joint Family remains as of old. The differences between the Mitakshara and Dayabhaga systems of joint family are still recognised, and with relation to them the law regarding migrating families is still recognised.⁵³ But when a Hindu family migrates from India to another country, the analogy is that of a change of domicile on settling in a new country, rather than the analogy of a change of custom on migration within India. The question is one of the proper inference to be drawn from the circumstances.

In a recent case *S. Govindan v. Bharathi*⁵⁴, the Kerala High Court had an occasion to discuss about the succession to the immovable property situated in

51. (1915) L.R. 43 I.A. 35 : 30 M.L.J. 227.

52. See supra note 51.

53. *Balwant Rao v. Baji Rao*, (1920) L.R. 47 I.A. 213 : 39 M.L.J. 166 : I.L.R. 48 Cal. 30 : A.I.R. 1921 P.C. 59.

54. A.I.R. 1964 Ker. 244.

England. K, an Indian subject left for England and lived there for 30 years. He left some movables and immovables in England and India. It was decided that he had not acquired domicile of choice and, therefore, he retained his Indian domicile. After the death of K, the immovable property in England was sold by the administrator and money finally deposited in the Indian Court. The question whether a particular property is movable or immovable has to be decided under the law of the place where the property is situate. According to the law of England the house property is considered, for the purpose of Private International law, to be immovable. If, therefore, an Indian Hindu who expires in England be found not to have lost his domicile of origin, his immovable properties in India and all his movables, whether in India or in England should be divided, according to the law of succession in India. And succession to the house in England, being immovable property according to the law of the situs as applied to conflict of laws, should be decided under the English law of succession. The subsequent conversion of that immovable property into money does not alter this position.

The above case is an example of the fact that the Indian Court in making a determination of ownership must ascertain the body of local law to which the Courts of the situs (England) would refer if the matter was brought before them. Such being the proper interpretation then, the Indian Court must in effect, place itself in the position of the foreign Court and decide the matter as would that Court in an identical case. The reason for applying the *lex situs* is that any adjudication which ignores the *lex situs* would be a *brutum fulmen*, since in the last report the land can only be dealt with in a manner permitted by the *lex situs*.⁵⁵

Therefore, where a Sunni Mahomedan migrated to Ceylon and acquired that domicile, Ceylon law enabled him to dispose of by will his movables and immovable properties in Ceylon and movables in British India according to the law of Ceylon, without being fettered by the rule of Mahomedan law, that more than 1/3rd could not be disposed of by will.⁵⁶ But with regard to immovable property in India, the Mahomedan law would be applied, as being the law of the locality where the property is situate.

Title to Movables.⁵⁷

Succession to the movable property of a person deceased is regulated by the law of the country in which such person had his domicile at the time of death.⁵⁸ The question whether property is movable or immovable is to be governed by the *lex situs*.⁵⁹ Again a person can have only one domicile for the purpose of succession to his movable property.⁶⁰ If a person dies leaving movable property in India, in the absence of proof of any domicile elsewhere, succession to the property is regulated by the law of India.⁶¹ Hence a person who attacks a settlement on the ground of a different nationality must show conclusively that the nationality of the settler was foreign. If he succeeds in doing so, the onus is then shifted

55. Dicey, *Conflict of laws*, 59

56. *Mohammad Koya v Ketheesa Br*, (1944) 2 M L J 365 : I L.R. (1945) Mad 476 : (1944) 57 L.W. 584 : A.I.R. 1945 Mad. 81.

57. English cases on the subject are *Hamilton v. Dallas*, (1875) L.R. 1 Ch. D. 257; *In the Goods of Lacroix*, (1887) 2 P.D. 94 : *In re O' Kneefe*, (1940) Ch. 124

58. See *Supra* note 14 and also 41.

59. See *supra* note 54

60. Section 6 of the Indian Succession Act, 1925

61. Section 19 of the Indian Succession Act, 1925.

upon the person supporting the settlement to show that the settler had acquired a fresh domicile in India and that his estate ought to be administered according to the Indian law.⁶² A unique feature of the Indian Succession Act, 1925 is that it constitutes the repository of the statutory law relating to domicile in India. But the importance of its provisions has been diluted by the wide exceptions provided in favour of Hindus, Mahomedans, Sikhs and Jains in section 4 of the Act. This may be attributed to the attitude of the British in not interfering with the personal laws of Hindus and Mahomedans. Apparently this *laissez faire* attitude has created more problems, than it attempted to solve in the field of conflict of laws and has given rise to somewhat far-fetched comments by text writers and judges.⁶³ It seems to me, therefore, that having no one personal law or law of the domicile or territorial law, there can be one public policy or good conscience. It follows, that we have our own problems within India: conflicts, so to speak of Private International law between group and group, community and community for which we have adopted the misbegotten word 'communal'. Those problems, judicially, no less than politically can only be solved by applying principles of mutual consideration.⁶⁴ Such acceptable principles could only be as laid down in clause (ii) of section 5 of the Indian Succession Act, 1925.⁶⁵ One of the illustrations under this section is like this: "A, an Englishman, having his domicile in France, dies in India, and leaves property, both movable and immovable in India. The succession to the movable property is regulated by the rules which govern, in France the succession to the movable property of an Englishman dying domiciled in France and the succession to the immovable property is regulated by the law of India." The principle laid down in this illustration should be accepted not only in case of persons over whom this Act is applicable, but also for the conflict of laws cases of Hindus, Mahomedans, Sikhs and Jains. Accepting this principle the Supreme Court in *Vishwanathan v. Abdul Wazid*⁶⁶ observed, "Succession to the estate of a person is governed by the *lex situs* in the case of immovables, and in the case of movables by the law of his domicile."

In *Miller v. The Administrator-General of Bengal*⁶⁷, H, a British subject having his domicile in England, married in Calcutta, W, a widow, who was also domiciled in England. W, after her marriage with H, became entitled as next of kin to shares in the movable properties of her two sons by her former marriage. Those shares were not realised nor reduced into possession by W during her life. After her death H, filed his petition in the Insolvency Court, and all his properties vested in the Official Assignee. Letters of administration of the estate and effects of W were, with the consent of H, granted to the Administrator-General of Bengal, by whom the shares to which W became entitled as next of kin of her sons were realised. The question arose whether the Official Assignee as assignee of the estate of H, was entitled to the whole fund realised by such shares in the hands of the Administrator-General. Markby, J., observed:

"Nowhere, as in the present case, a man and woman having the same domicile marry during a temporary sojourn in a foreign country, and do not evince any intention to change their domicile. The law of Christian countries is unanimous as to the interest which they acquire in the movable property of each other. It is that interest which is given them by the law of the country wherein they are domiciled at the time of marriage.

62. *Bornard v. Emile Charriot*, 32 Cal. 631.

63. *B. Sivaramayya*, 'Some aspects of Indian Succession Act', (1957) S.C.J. 222.

64. A.I.R. 1942 Cal. 329.

65. See *Supra* note 14.

66. See *Supra* note 41.

67. (1875-76), I.L.R. 1 Cal. 412.

'The *lex loci* of India like the *lex loci* of all other countries is applicable to the immovable property of foreigners sojourning but not domiciled here, but not to their movable property. Nothing remains for the decision of the present case, but to apply to this property the law of England where, in contemplation of law, the property is situate, and there is no dispute that by the law of England the husband would be entitled to the whole.'⁶⁸

The Indian Court here referred to the English law including the English Private International law, which was the same as the Indian Private International law. Both laws being the same there was no problem of *renvoi* here. The Court applied the *lex domicilii* while placing itself in the position of the foreign Court and deciding the matter as would that Court in an identical case do.

Again in *Hill v Administrator-General of Bengal*⁶⁹ the plaintiff who had an English domicile, married a wife with an Indian domicile in British India. The wife was entitled to a certain fund subject only to a life interest therein on the part of her mother. After the wife's death the husband claimed the whole of the fund under English law, to the exclusion of the wife's mother and brother. A question arose as to which law shall govern the matter. Since on marriage the wife acquired the domicile of her husband, the Court referred to English law as the law of domicile. The English law being the same, that movables are to be distributed according to *lex domicilii* the Court applied the English law of succession and held that the husband was entitled to the whole of the fund. Though the principle of *renvoi* is not clearly visible, and the Court did not discuss that doctrine, the Court applied the *lex domicilii*, while placing itself in the position of the English Court and deciding the matter as that Court would in an identical case do.

Matters of Marriage or Divorce.⁷⁰

Sometimes it may happen that two persons are husband and wife in one country, but they are separate persons in another country. H may be considered husband of W in one country and husband of C in another country. In *Ratan Shaw v Bamanji*⁷¹, the Bombay High Court observed that D might be wife of A in the Baroda State, but for purposes of succession to immovable property B continued to be the wife of A and D could not be recognised as a validly married wife of A in British India. Wadia, J., agreed in principle that status would ordinarily be determined according to the *lex domicilii* but for purposes of succession to immovable properties *lex situs* would be made applicable according to which a divorce among Parsis by mutual fargats or releases was unknown.

The Court in Baroda would have granted a decree of divorce between A and B, on the basis of Parsi custom and in this sense that would have become a *right in rem*. Should this rule be restricted to the recognition of the divorce decrees or should it be extended to matters of status for purposes of succession? There is no unanimity on this subject between writers. While the judgment in *In re, Askew*⁷² suggests the latter view, Lorenzen has suggested that "a marriage should be upheld if it satisfies either the law of the place where it was entered into or the law of the domicile of the parties"⁷³. Thus in *Sophy Auerbach v Shivaprasad*⁷⁴ A,

68 See Supra note 67

69 (1896) 1 L.R. 23 Cal 506

70 English cases on the subject are *Armitage v Attorney General*, L.R. (1906) P 135, *In re Askew*, L.R. (1930) 2 Ch 259

71 See Supra note 49

72 L.R. (1906) P 135

73 Lorenzen 'The *Renvoi* Theory and the application of foreign law, See also Paras Diwan, 251

74 A.I.R. 1945 Cal 484

Jewess, was a British subject domiciled in England. She married B, a Hindu domiciled in India. The marriage was celebrated in Paris in accordance with the French laws. Three sons were born of this union. Prior to this marriage B had married 'C', a Hindu woman according to Hindu rites in India. 'A' prayed that since she was not aware that 'B' had already married 'C', the marriage of 'B' with her should be declared null and void. A question arose whether the marriage was a nullity or not.

The *lex domicilii* being Indian and the *lex loci celebrations* being French, the Court considered both laws. Expert evidence was taken as to French law, which showed that in French law polygamy, was absolutely forbidden and bigamy was a crime when committed in France even by a foreigner whose personal law permitted polygamy. Since the Court was not satisfied with the expert evidence, it went through the English law. An English Court would not recognize the defendant's Hindu marriage as a valid marriage, in that it was potentially polygamous, and would recognise the marriage in Paris as valid marriage.⁷⁵ The Indian Court, referred to English Court and since English Court would not recognize such marriage in India, it held that the marriage between B and C was not valid according to French Courts. Roxburgh, J., observed:

"As it would not in my opinion be regarded as a valid marriage by the English Courts and as there is no evidence to show that the French Courts would take a different view from the English Courts on this matter, I hold that the defendant's first Hindu marriage would not be regarded by the Courts in France as a valid marriage. If that is so, there was no bar in French law to the defendant going through a form of marriage with the plaintiff in April, 1931. I am, therefore, of opinion that it has not been proved that the marriage in Paris in 1931 of the plaintiff and defendant is void under French law."⁷⁶

In the above case, the husband was domiciled in India. The wife was a British subject and domiciled in England. The marriage was celebrated in France. The evidence before the Indian Court showed that a Court in England had it been seized of the case, would have recognised the marriage in France as valid and would not have recognised the prior marriage in India as valid. The Indian Court, on the basis of foreign Court theory held that the validity of the French marriage must also be recognized in India.

Conclusion.

The situation which mostly gives rise to the application of the doctrine of *renvoi* is the conflict between the nations to determine cases according to the concept of nationality or domicile. This aspect of *renvoi* was considered by the Seventh Hague Conference on Private International Law in 1951 wherein a Draft Convention was proposed as follows:

Art. 1: "When the State where the person concerned is domiciled prescribes the application of the law of his nationality, but the State of which such person is a citizen prescribes the application of the law of his domicile, each contracting State shall apply the provisions of the internal law of his domicile."

Art. 5: Defined domicile, "as the place where the person habitually resides — unless the domicile of such person depends on the domicile of another person or on the seat of some public body."

75. "A marriage contracted in a country where polygamy is lawful, between a man and woman who profess a faith which allows polygamy is not a marriage as understood in Christendom." L.R. (1866) 1 P & D 130 : 14 W.R. 51 *Hyde v. Hyde*.

76. A.I.R. 1945 Cal. 487.

There is no possibility of another such conference in the near future. The Indian view point from the number of cases quoted above is clear that our Courts seek to reach whatever decision the English Court would reach. Further our Courts have accepted remission to Indian law in certain cases and applied the internal law without considering *renvoi* further. In order to clear up the chaos a short statute on the following lines is necessary.

(1) Title to immovable property should be determined by a reference to the whole of the *lex situs*, i.e. including the rules of conflict of laws. In the case of Hindus migrating from one part of India to another part in India it should be governed not by the *lex situs*, but by the personal law of the party. In the case of Mohammadans also personal law should govern the title to immovable properties in India. When the immovable property is outside India succession to land should be governed by *lex situs*. The subsequent conversion of that immovable property into money should not alter this position.

(2) The law relating to domicile available in sections 4 and 5 of the Indian Succession Act 1925 should be made applicable to Hindus Mahomedans Sikhs Jains etc. so that there would be less controversy regarding the principles of domicile and personal laws.

(3) Formal validity of will should be determined by the law of domicile. A grant of probate to wills should not be denied on the ground of formal invalidity if the instrument is formally valid according to *lex domicilii*.

(4) A marriage should be considered valid if it satisfies either the law of the place where it was entered into or the law of the domicile of the parties or the personal law of the parties.

MATRIMONIAL CRUELTY IN HINDU LAW

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Marriage in Hindu Law is a sacramental institution and not a contractual obligation. This peculiarity of Hindu Marriage is quite conspicuous even after the coming into force of the Hindu Marriage Act, 1955. It is true that the law has undergone a radical transformation in some important respects by giving statutory recognition to certain matrimonial reliefs like judicial separation¹, divorce² and nullity of marriage³, but it did not obliterate the sacramental character of the Hindu Marriage. As an eminent authority⁴ points out 'the shastrie concept of marriage as a *samskar*, a union of two persons for all purposes spiritual and secular, indissoluble even by death has been trimmed but not destroyed by legislation'. This fact is to be constantly kept in mind while evaluating the effects of legislative changes on Hindu legal system.

The two of the matrimonial reliefs recognized by the Hindu Marriage Act, 1955 are (i) judicial separation and (ii) divorce. The former is a separation of husband and wife in bed and board but there is no dissolution of marriage which still subsists. The latter is a dissolution of marital tie so that all rights and obligations associated with marriage cease to exist. In judicial separation there are chances for future reconciliation leading to restitution of conjugal life.

The grounds for divorce and judicial separation are not the same as in the case of Special Marriage Act, 1954. The divorce is an extreme measure which may be necessitated by circumstances rendering the marriage tie odious or fruitless. Under the Hindu Marriage Act therefore divorce is not as easy as in some other non-Hindu legal systems. The matrimonial cruelty which is one of the grounds for judicial separation as well as divorce under the Special Marriage Act will justify only judicial separation under the Hindu Marriage Act. It is this ground of matrimonial cruelty justifying judicial separation that has to be dealt with in the present paper.

The Act does not give a comprehensive definition of cruelty. As regards cruelty section 10 of the Hindu Marriage Act only says that a petition may be presented by either party to a marriage praying for a decree for judicial separation on the ground that the other party 'has treated the petitioner with such cruelty as to cause a reasonable apprehension in the mind of the petitioner that it will be harmful or injurious for the petitioner to live with the other party'. This definition is somewhat similar to the definition of legal cruelty in English matrimonial law as laid down in *Russel v. Russel*.⁵ No statute of Indian legislature except perhaps the Dissolution of Muslim Marriage Act, 1939 attempts to give a more comprehensive definition of cruelty. Cruelty is one of the grounds for dissolution of marriage under the above enactment. It may be of some interest to see how cruelty has been described under the Dissolution of Muslim Marriage Act, 1939. Under section 2 of the Act dissolution of marriage may be obtained by the wife if the husband treats the wife with cruelty, which means that he—

(i) habitually assaults her or makes her life miserable by cruelty or bad conduct even if such conduct does not amount to ill-treatment.

(ii) or associates with women of evil repute or leads an infamous life;

(iii) or attempts to force her to lead an immoral life;

1. Section 10 Hindu Marriage Act.

2. Section 13 Hindu Marriage Act.

3. Sections 11 and 12 Hindu Marriage Act.

4. Derret in Introduction to Hindu Law, 1963 pp. 137-138.

5. L.R. (1897) A.C. 395.

(iv) or disposes of her property or prevents her from exercising her legal right over it

(v) or obstructs her in the observance of her religious profession or practice

(vi) or if he having more wives than one does not treat her equitably in accordance with the Koranic injunctions

Thus the Act attempts to describe some of the common forms of cruelty which could justify dissolution of marriage. These forms of cruelty are only illustrative not exhaustive. There may be many other acts overt and covert on the part of the husband which may also amount to cruelty. Even before this enactment came into force cruelty was regarded as a sufficient ground for dissolution of marriage in Muslim law at the suit of the wife⁶ but incompatibility of temperament did not amount to cruelty. If we throw a cursory glance on the cases decided in British India we shall find that almost all the decisions on cruelty as matrimonial offence whether they relate to Hindu law or to Mohammedan law follow the decisions of the English Courts. Thus Mr Justice Melville in *Yamuna Bai v Narayan Moreswar Pendse*⁷ observed. In a suit between Hindus the only safe and practical criterion of cruelty is that contained in the definition which guides the English Courts namely that there must be actual violence of such a character as to endanger personal health and safety or there be the reasonable apprehension of it. It was further observed that mere pain to mental feelings such for instance as would result from an unfounded charge of infidelity however wantonly caused or keenly felt would not come within the definition of legal cruelty. Somewhat similar observations were also made with regard to Mohammedan law in *Moonshi Buzloor Ruheem's case*⁸. According to the Judge Melville J the English law would not recognize what is known as mental cruelty and therefore false and unfounded accusations of infidelity however wantonly caused and keenly felt would not amount to cruelty. However it may be noted that with the march of time the conception of cruelty in English law has also undergone a change. As some of the decisions of the English Courts indicate cruelty may be mental as well as physical. The Court will infer cruelty where there is no actual physical violence but the conduct of the respondent is such as to affect the petitioner's health. Thus false accusations of infidelity have been held to be cruelty in some of the cases.⁹ In English matrimonial law however mental cruelty is actionable only in so far as its effects are physical. The distinction commonly drawn between physical and mental cruelty is really quite arbitrary and is made for convenience only.¹⁰

In India as contemplated by section 10 of the Hindu Marriage Act mental and physical cruelty are obverse and reverse of the same coin. The mental cruelty may be as dangerous as or even more dangerous than actual physical violence if some harm or injury is reasonably apprehended by the petitioner in further cohabitation with the respondent. However it will not be safe to follow the English decisions on all questions involving cruelty whether mental or physical. Thus though unfounded allegations of infidelity may amount to mental cruelty¹¹ all acts deemed to cause mental pain and suffering to a spouse will not necessarily amount to cruelty in Hindu law though they would be instances of cruelty in English law. This will depend on the cumulative effect of all the circumstances and facts of the case and will have to be viewed and assessed in the light of the traditions customs and usages

6 *Kadr v Kolemam Bb* 1 L R (1935) 62 Cal 1088

7 *Mt Mustafa Khan v Mirza Khan* (1933) O A 15

8 1 L R (1875 77) 1 Bom 164

9 (1867) 11 M L A 551

10 *Jeapes v Jeapes* (1903) 89 L T 74 *Walker v Walker* (1898) 77 L T 715 *Oatway v Oatway* (1813) 2 Ph II 109

11 *Allen Aspects of just ce* p 199

12 *Kuppuswami Gounden v Alagannal* A I R 1961 Mad 391 *Iqbal Kaur v. Prltam Singh* A I R 1963 Punjab 242

of the society. The entire Hindu law of marriage centres round the Shastric concept of Dharma which lays greater emphasis on duties and obligations than on rights and privileges. 'To the Hindus' says Prof. Banerjee¹³, 'the importance of marriage is heightened by the sanctions of religion.' The Dharma enjoins every Hindu to perform the marital obligations in a spirit of mutual adjustment and accommodation making all possible allowance for what might appear to be the flaws, angularities and shortcomings in the temperament of each other, for human nature is not infallible. This point has also been stressed in a very recent case of *Smt. Uma Bai v. Chittar*¹⁴ Their Lordships observed at page 207: 'We make it very clear that every unpalatable behaviour of the other spouse is not necessarily 'Cruelty' physical or even mental so as to afford a ground for judicial separation under section 10 of the Act. Sometimes when parties to marriage forget that married life is a 'joint adventure' and they do not 'bear and forbear', differences occur and if they are not resolved amicably, they give rise to misunderstanding and if either party lacks the force of character and the art of tact and patience, they aggravate and aggravate sometimes to such an extent that the parties begin to feel hostile to each other. Thus it becomes difficult to horn their minds to peace. And, if they have foolish advisers, fuel is added to fire; their problems are converted from molehills into mountains. With a law enabling dissolution of marriage, they rush to the Court and wash their dirty linen. Each seeks the pride of winning the case.' Here it is that the Court has carefully to bear in mind that the expression 'cruelty' is employed in the Act in a limited sense.'

Section 10 (i) (b) of the Hindu Marriage Act, 1955, postulates the treatment of petitioner with such cruelty as to cause a reasonable apprehension in the mind of the petitioner that it will be harmful or injurious for the petitioner to live with the other party. In the first place the petitioner must have apprehended such cruelty as to render further cohabitation with the other party harmful or injurious though not impossible. The legislature thus did not accept the "absolute impossibility" theory which was propounded for the first time in England in *Evans v. Evans*¹⁵ and which met with disapproval in *Russel v. Russel*. The test therefore is subjective in so far as it is intended to protect the petitioner for the future. Again the apprehension of future injury or harm caused in the mind of the petitioner should be reasonable. It is reasonable apprehension alone which will give rise to an action in law. 'After all it is beyond dispute that apprehension of injury must be reasonable in order to constitute cruelty'. The test to be applied by the Court is thus also objective for otherwise it would be open to the petitioner to make the mountain out of molehills.¹⁶

Is intention necessary to constitute cruelty as a matrimonial offence? One view¹⁷, probably on the analogy of English law is that generally there must be an intention to cause suffering to the other spouse. But a review of some of the recent cases will show that even in English matrimonial law intention is not a necessary element to constitute cruelty though it may be a decisive factor to establish cruelty. In *Timmins v. Timmins*¹⁸, Denning, L.J., observed: "It is well settled that an intent to injure, if not an essential element, is at any rate a most

13. G. D. Banerjee : The Hindu Law of Marriage and Stridhan T. L. L. 4th ed. p. 29.

14. A.I.R. 1966 Madhya Pradesh 205.

15. (1790) 1 Hag. Con. 35.

16. In England the Royal Commission on Marriage and Divorce in its report in 1956, did not favour the objective standard but was of the view that cruel conduct, must be judged with reference to the person affected by it. And yet says Allen, it is sometimes difficult to avoid recourse to an "objective" test to the extent at least of asking whether any normally constituted spouse would have made mountains of molehills. Commonsense and common experience must have some say in the matter....." Aspects of Justice 1958 p. 180.

17. Raghavachariar : Hindu Law 5th ed, 1955, p. 982.

18. (1953) 1 W.L.R. 757.

important element in cruelty. In the absence of an intent to injure a Judge may well be satisfied in refusing to find cruelty. In *Jamieson v Jamieson*¹⁹ Lord Merriman pointed out that actual intention to injure was not an essential factor and that intentional acts may amount to cruelty even in the absence of any intention of being cruel. But it was also observed in this case that actual intention to hurt may have in doubtful cases a decisive importance. Actual intention to hurt is a circumstance of peculiar importance because conduct which is intended to hurt may strike with a sharper edge than conduct which is the consequence of mere obtuseness or indifference²⁰. The conclusion of the Judicial Committee in *Lang v Lang*²¹ was *Prima facie* a man who treats his wife with gross brutality may be presumed to intend the consequences of his acts. Such an inference may indeed be rebutted but if the only evidence is of continuous cruelty and no rebutting evidence is given the natural and almost probable inference is that the husband intended to drive out the wife. In two recent decisions of *Cooper v Cooper*²² and *Waters v Waters*²³ it was held that intention to injure the wife was not necessary to constitute cruelty²⁴. The true position says Prof. Allen²⁵ is summed up in a dictum of Shearman J²⁶ that the question is not whether a spouse intended to be cruel but whether his intentional act amounted to cruelty. Thus there exists in England a most subtle distinction between a conduct which a reasonable man would know might have an injurious effect on the wife's health and conduct which is done with an intention to injure²⁷. In Hindu Marriage Act emphasis on motive or intention of the respondent is quite conspicuous by its absence. The existence of cruelty under the Act depends not at all on the intention of the respondent but on those acts of omission and commission on his part which create in the mind of the petitioner a reasonable apprehension of danger to his or her life limb or health in future by further cohabitation with the other party.

Theories of matrimonial cruelty.—In English law there are three important theories on matrimonial cruelty. They furnish the tests for awarding matrimonial relief on the ground of cruelty. These theories may be summed up as follows

(1) Doctrine of Danger

This was propounded for the first time in *Russell v Russell*. According to this theory the hostile behaviour by a spouse did not amount to cruelty unless it caused actual injury or the reasonable apprehension of it to the life limb or health of the other spouse.

(2) Absolute Impossibility test

This theory as already noted was laid down by Lord Stowell in *Evans v Evans* where he said that in order to establish cruelty the causes must be grave and weighty and such as to show an absolute impossibility that the duties of married life can be discharged.

(3) Doctrine of Protection

It is in fact a corollary of the doctrine of danger. According to the doctrine of protection the whole and sole object of the remedy provided by law for

19 (1952) A.C. 525, 540, 541.

20 per Lord Normand at p. 550.

21 (1955) A.C. at p. 428.

22 L.R. 1955 Pro. 99.

23 L.R. (1956) P. 344.

24 See also Allen *Aspects of Justice* p. 223.

25 *Ibid*.

1 In *Haden v Hadden* The Times December 5, 1919.

2 See Derret, *An Introduction to Hindu Law* 1963 p. 214.

cruelty is to safeguard the injured spouse from further injury". In *Lissac v. Lissac*³, Pearce, J., observed: 'The Court's duty to interfere is intended not to punish the husband for the past but to protect the wife for the future.'

None of these theories seems to have the merit of universal acceptance. Though the first theory seems to have triumphed over the second in *Russel v. Russel* and is still a governing principle to decide cases on cruelty, it does not seem to have been consistently followed and adopted in the later decisions. In *Russel v. Russel* itself four of the Peers were in favour of the absolute impossibility test. Lord Hobhouse vehemently opposing the 'doctrine' of danger observed: "cruelty has never been confined to cases of personal danger but has been judged by a wider and more reasonable criterion expressed by Lord Stowell, namely, whether or not conjugal duties have become impossible between the litigant husband and wife."⁴ The two recent cases *Gollins v. Gollins*⁵ and *Saunders v. Saunders*⁶, leaned more in favour of the absolute impossibility test though the impossibility contemplated here is not the absolute impossibility of discharging matrimonial obligations. In *Saunders v. Saunders*, Sir Jocelyn Simon, P. observed at p. 38 that the 'test is still: was the conduct of such a grave and weighty nature as to make cohabitation virtually impossible?' This was the case in which two of the matrimonial offences, cruelty and desertion were involved and the Court followed the 'grave and weighty' test. Referring to the judgment of Lord Pearce in *Gollins v. Gollins*, Scarman, J. in this case said: 'The truth is that Lord Pearce was recognizing that the "grave and weighty" test of alleged matrimonial misconduct remains in full force and effect as one of the great safeguards against matrimonial relief being given on mere trivialities or incompatibility.'

The doctrine of danger does not meet the demands of justice. As Prof. Allen⁷ points out 'the principle is not without manifest disadvantages, the chief of which is that it seems to set a premium on sensitiveness or even on neurosis. The spouse who endures the wrong with fortitude in the hope of improving unhappy relations seems to fare worse than the one who breaks down under the strain and abandons hope of saving the marriage.' The theory puts undue emphasis on the subjective test and puts out of consideration any objective standard in the absence of which the hostile behaviour of a spouse might be grossly exaggerated. Absolute impossibility test is also untenable because it will require several other tests to find out its precise connotation. As was observed by the majority in *Russel v. Russel* it is quite impracticable to establish any safe test of the 'impossibility of marriage.' Doctrine of protection also does not furnish any safe guide. It was thus criticised by Hudson, J. in *Swan v. Swan*⁸: 'I can find nothing in the old authorities to justify the proposition that a decree based on cruelty is a remedy given not for a wrong inflicted but solely as protection for the victim'. The Royal Commission on Marriage and Divorce (popularly known as, the Morton Commission) have in the Report of 1956 rejected the 'doctrine of protection' with regard to cruelty as a ground for divorce but not for judicial separation.

Position in India:

The Courts in India have been called upon to decide a few cases on cruelty as a ground for judicial separation under section 10 of the Hindu Marriage Act. Though the English decisions have been frequently referred to, the Courts do not

3. (1950) 2 All E.R. 233.

4. *supra* page 438.

5. (1964) A.C. 644.

6. (1965) 2 W.L.R. 32.

7. *Aspects of Justice* p. 178.

8. (1953) 2 All E.R. 854.

seem to have adopted any particular theory. On the other hand they have been cautious in following the English decisions in the peculiar context of Indian conditions. Thus in *Uma Bai v Chhittar*⁹, Justice Dayal observes: 'But the Courts should be extremely careful while seeking assistance and guidance from English decisions or even Indian decisions on other laws now in force or previously in force and should not follow them blindly, particularly while dealing with persons whose manners, customs and mode of life may be different from those of the parties concerned in those decisions.'

There are some decisions however from which it may be inferred that the Courts in India have leaned in favour of the doctrine of protection. In *P. L. Sayal v Sarla Ram*¹⁰ an ignorant and superstitious wife administered a love potion to her husband in the belief that it would lead to conjugal happiness. The love potion however had an adverse effect on the health of the husband and when his health broke down completely in consequence thereof, his wife showed remorse and repentance. It was held that his husband was justified in apprehending danger to his future safety by other similar acts of the wife in future and a decree for judicial separation was granted to him.

Shamsher Bahadur J. said¹¹ that the petitioner has suffered a great deal from the hands of an ignorant wife and no amount of repentance can undo wrong that has been wrought and 'it would be futile to expect the petitioner and the respondent to live a normal married life again and it would be a plain denial of justice to keep them within the bounds of marriage.'

However it is submitted with respect that the decision goes too far. It will not be fair to say that the foolish conduct of the wife amounts to cruelty. In our country many people and specially the women are under the clutches of superstitions. Allowance should have been made for this fact also. In holding the balance equally between conflicting principles it is our duty to examine the social and historical background before deciding a purely legal question.¹² It will be erroneous to presume that the doctrine of protection as the basis of remedy for matrimonial cruelty has been judicially approved in the present case. On the other hand the judgment seems to refer to the principles of social justice.

The doctrine of protection however seems to have received a limited recognition in *Uma Bai v Chhittar* where relying on *Lissac v Lissac* it was observed that "The existence of cruelty depends not on the magnitude, but rather on the consequence of the offence of cruelty actual or apprehended. In a petition based on cruelty the duty of the Court to interfere was intended not to punish the husband for the past but to protect the wife for the future." In this case the parties were rustic cultivators. The husband had falsely charged the wife with immorality and adultery and persisted in that charge. It was held that having regard to all the circumstances a reasonable apprehension had been caused in the mind of the wife that it would be harmful or injurious for her to live with the respondent and that she was entitled to a decree of judicial separation on the ground of cruelty.

The Courts have not so far formulated any theory of matrimonial cruelty. All that has been suggested is that the Courts in India are to decide the cases in the light of all the facts before them so that full justice may be done to the parties and that though the English decisions may be helpful they should not be blindly followed. Judicial dicta in some of the cases however seem to give orientation to a new theory eminently suited to the conditions of Indian society. This may

9 *supra* p. 206

10 A I R 1961 PmJ 125

11 *Ibid* p. 243

12 Fyzee *Outlines of Muhammadan Law* 1964 p. 177

be termed as the theory of social justice. Thus Tek Chand, J. in *Munishwer Dutt v. Indra Kumari* rightly observes.¹³ A marriage concerns not only the two persons who have entered into matrimony but also the society. It is the concern of the society apart from the interest of the two individuals affected that marriage as such should as far as possible be preserved. The law must guard and maintain the matrimonial relation with watchful vigilance, as marriage vitally affects the public welfare.....

Marriage relationship between any two persons being also a matter of public concern, the Courts have therefore to scrutinize questions involved in annulment or dissolution from the point of view of social well-being.*

Social well-being or social justice therefore is the supreme desideratum of matrimonial law. This may be stated as follows:—

(i) The Court is to adopt in the light of all the facts before it that line of thought which is most conducive to social justice. It is the good and welfare of the whole society that has to be constantly kept in mind. The Court will therefore hesitate to decree the claim of the plaintiff on the basis of those facts which though instrumental in causing hardship to the plaintiff by reason of his or her extremely sensitive nature are not judged as such by the norms of social justice. “.....let it always be remembered that social justice is the main foundation of the democratic way of life enshrined in the provisions of the Indian Constitution.”¹⁴ The fault may be equally attributable to the plaintiff who has failed to give due allowance to the ‘irritating idiosyncracies’ of the respondent.¹⁵

(ii) The concept of cruelty is not static but variable according to changing social conditions. This has been pointed out in several cases. In *Shyamsunder v. Shantamani*¹⁶, Mahapatra, J. observes:

“Regarding the conception of mental cruelty and desertion, the conceptions are fast changing and we are to take cognizance of the present conceptions even amongst the Hindus as to monogamous marriage.” It also follows that even those acts may amount to cruelty which though approved by the sacred texts are treated with abhorrence, hate and disdain in the society. This has been enjoined by no less an authority than Yagnavalkya:—

कायेन मनसा वाचा यन्नाद् धर्मं समाचरेत् ।
अस्वर्ग्यं लोकविद्विष्टं धर्म्यम् अप्याचरेत् न तु ॥

याज्ञवल्क्यः १ ॥ १५६ ॥

Practice with care what is lawful by body, mind and speech, but practise not that which is abhorred by the world, though it is ordained in the sacred Books; for it secures not spiritual bliss.

—Yagnavalkya: i, 156.

For example according to a text of Manu¹⁷ a wife may be punished for her faults ‘with a rope or small shoot of a cane; but on the back part of the body and not on a noble part by any means.’ Judged by the modern standards the rule is certainly barbarous and to punish the wife in this way will certainly amount to

13. I.L.R. (1963) 2 Pooj. 263 : A.I.R. 1963 Punj. 449.

14. Per Gajendragadkar C. J. in *Yagnapurshdasji v. Muldas*, (1966) 2 S.C.J. 502.

15. See *Narayan Pd. Chaubey v. Prabha Devi*, A.I.R. 1964 M. P. 28 at p. 1135, where the husband asked for judicial separation because his wife did not show any respect to his mother. The Court refused to give remedy to the husband and observed that “..... having accepted her before the nuptial fire, he has to give allowance to her irritating idiosyncrecies.”

16. A.I.R. 1962 Orissa 50 (51).

17. Manu VIII 299. 300 (Quoted by Dr. G.D. Banjerjee in *Marriage and Stridhan*).

* Possibly this consideration is implicit in the provision in section 23 (2) of the Hindu Marriage Act.—Editor.

cruelty In fact as Dr Banerjee¹⁸ points out this rule has been seldom carried into execution and the weight of Manu's authority in this instance is almost balanced by a text of high authority which says 'Strike not even with a blossom a wife guilty of a hundred faults'¹⁹ In *Kaushalya v Wisakhi Ram*²⁰ I D Dua J rightly points out 'New rules of social behaviour and conduct in respect of the status of women in the Indian society of today must in my view be recognised and kept in the forefront while determining what would really amount to cruelty under the Hindu Marriage Act

(iu) It is on the principles of social justice that in Hindu law intentional omission to protect the spouse from ill treatment is as much cruelty as if the respondent were himself guilty of that treatment²¹ It is the duty of the husband to protect his wife from being ill treated by his relations In *Shyamsundar v Shantamani*²² as the wife brought no dowry she incurred the wrath of her husband's relations who locked her up and kept her without food The husband was all through a silent spectator and when she had been rescued with the aid of the police he threatened to marry again It was held that he was guilty of cruelty

(iv) The Dharma is the very basis of Hindu Legal system and the principles of justice equity and good conscience constitute an important evidence of Dharma

श्रुति स्मृति सदाचार स्वस्य च प्रियम् आत्मन ।

सम्यक् सङ्कल्पन कामो धर्ममूलम् इदं स्मृतम् ॥

याज्ञवल्क्य १ ॥ ७ ॥

The *sruti* the *smriti* the approved usage what is agreeable to one's soul or good conscience and desire sprung from due deliberation are ordained the foundation or evidence of Dharma

Will it not be proper to apply therefore the rules of justice equity and good conscience of Hindu jurisprudence to cases of cruelty and other matrimonial offences under the existing law The word reasonable used in section (10) (i) (b) of the Hindu Marriage Act is similar to स्वस्य च प्रियम् आत्मन (agreeable to one's soul or good conscience)

It will however be preposterous to presume that by justice, equity and good conscience is meant the rules of English law modified to suit Indian conditions

Hindu law is a jurisprudence by itself and contains within limit all the principles necessary for application to any given case²³

Lastly it should always be remembered that cruelty under Hindu Marriage Act is a ground only for judicial separation It does not give the remedy of divorce for the law has been so framed as to provide maximum opportunities for mutual adjustment and reconciliation It follows therefore that while the decisions on analogous provisions of the Special Marriage Act 1954 may be helpful they should be followed with great caution so that the parties may not suffer injustice

[END OF VOLUME (1966) II S C J (JOURNAL)]

18 Dr G D Banerjee *supra* p 119

19 Colebrooks D gest B K II Ch I II note

20 A I R 1961 Punj 521 at p 524

21 Derret *Supra* p 215

22 A I R 1962 Or ssa 50

23 Per Chandravarkar J in *Kalgavada Tayanappa v Somappa* I L R (1909) 33 Bom 661,

V. Ramaswami, V. Bhargava
and Raghubar Dayal, JJ.
31st August, 1966.

Bakhashish Singh Dhaliwal v.
The State of Punjab.

Cr. As. Nos. 150-151 and 196-199 of 1962.

Penal Code (XLV of 1860), sections 417 and 420—Scope—Criminal Procedure Code (V of 1898), section 197—Sanction of Central Government—When essential for prosecution for cheating and abetment.

In fact, in every case where property is delivered by persons cheated, there must always be a stage when the person makes up his mind to give the property on accepting the false representations made to him. It cannot be said that in such cases the person committing the offence can only be tried for the simple offence of cheating under section 417, Indian Penal Code and cannot be tried under section 420 because the person cheated parts with his property subsequent to making up his mind to do so. The conviction of the appellant for the offence under section 420, Indian Penal Code in these circumstances is in no way vitiated.

The liability of the appellant for conviction for the offence of cheating was challenged on one other ground. It was urged that the appellant left Burma on 15th April, 1942, while the claims which had been found to be bogus related, at least to a considerable extent, to works alleged to have been done or materials alleged to have been supplied after that date, so that the appellant could have no personal knowledge that the claims put forward by him were bogus. The finding of fact recorded by the High Court in respect of the charges for which the appellant has been convicted is that the work to which the claims related were not carried out at all, or that the supplies concerned were never made. Once the finding is categorically recorded in this manner, we do not think there was any burden placed on the prosecution to establish that the appellant had personal knowledge of the bogus nature of his claims. Knowledge involves the state of mind of the appellant and no direct evidence of that knowledge could possibly be given by the prosecution. The very fact that the claims were bogus and did not accord with the true facts, leads to the inference that the appellant knew that the representations which he was making in these claims were false. It is significant that the appellant had not come forward with any explanation that he made these claims on the basis of information given to him by any particular person whose word he had no reason to doubt. In fact, the claim purported to be based on the facts that the appellant knew that he was entitled to the amounts included in the claims because he had carried out the works or had supplied the materials relating to the claims.

The next point urged was that in this case the trial of the appellant was vitiated because up to a certain stage he was tried together with Henderson who was charged with the offence of abetment of cheating under section 420 read with section 109, Indian Penal Code and Henderson was put to trial without any sanction of the Central Government under section 197 of the Code of Criminal Procedure.

Applying its decision *K. Satwant Singh v. The State of Punjab*, (1960) 2 S.C.R. 89: (1960) M.L.J. (Cr.) 603 : (1960) S.C.J. 863 : A.I.R. 1960 S.C. 266, the Court held : that sanction under section 197 of the Code of Criminal Procedure was not required for a valid trial of Henderson for the offence of abetment of cheating because it cannot be held that a public servant committing such an offence is acting in the discharge of his duties as such.

The appellant was not a Government servant but only an independent contractor and in his case, therefore, there was no question of any sanction of the Central Government being obtained under section 197 of the Code of Criminal Procedure. His trials would, therefore, be unaffected by the want of sanction of the Central Government for the prosecution of Henderson.

The validity of the trials was also challenged before us on the ground that the Special Tribunal which recorded the convictions of the appellant was not constituted in accordance with law and was incompetent to hold the trials. The Court held

Further, when the Tribunal later on functioned with only one single member, the law had already been altered by Punjab Act X of 1950 which provided for change of composition of the Special Tribunal and laid down that instead of three members the Tribunal was to be composed of one member only. The Tribunal thus, at each stage, was properly constituted and functioned competently.

The next point that the appellant was not given an adequate opportunity to produce his defence evidence the Court held. It is now too late for the appellant to make a fresh grievance in this Court that the witnesses in Pakistan were not examined. The others were given up as they were not available. There has, therefore, been no failure to examine witnesses in England.

In the result all the appeals are dismissed subject to the modification that the compulsory fine imposed on the appellant in respect of charge No. 21 which was the subject matter of Criminal Appeal No. 478 of 1949 in the High Court, is reduced from Rs. 1,08,400 to Rs. 54,200.

R. L. Anand, H. L. Sibal Senior Advocates (*R. L. Kohli* and *J. C. Talwar*, Advocates), for Appellant

Purshottam Trikumdas Senior Advocate (*Kartar Singh Chawla* and *R. N. Sachithy*, Advocates), for Respondent

G. R.

Appeals dismissed

[SUPREME COURT]

V. Ramaswami, V. Bhargava
and *Raghubar Dayal*, JJ
23rd September, 1966

M. L. Sethu v
R. P. Kapur
Cr. A. No. 110 of 1965

Criminal Trial—First complaint under sections 420, 109, 114 and 120 B, Penal Code—Second complaint under sections 204, 211 and 385, Indian Penal Code—Competency

The only point that falls for determination by this Court is whether, in this case cognizance of the complaint, which included an offence under section 211, Penal Code, filed by the respondent against the appellant, was rightly or wrongly taken by the Courts.

In dealing with this question of law, the important aspect that has to be kept in view is that the point of time at which the legality of the cognizance taken has to be judged is the time when cognizance is actually taken under section 190, Criminal Procedure Code. Under the Code of Criminal Procedure which applies to trials of such cases, the only provision for taking cognizance is contained in section 190. Section 195 which follows that section is in fact, a limitation on the unfettered power of a Magistrate to take cognizance under section 190.

Mr. Frank Anthony on behalf of the appellant urged before us that even in those cases where there may be no pending proceeding in any Court, nor any proceeding which has already concluded in any Court, the bar of section 195 (1) (b) should be held to be applicable if it is found that a subsequent proceeding in any Court is under contemplation. We do not think that the language of clause (b) of sub-section (1) of section 195 can justify any such interpretation.

We, consequently, hold that in this case the complaint which was filed by the respondent, was competent and the Judicial Magistrate at Chandigarh, in taking cognizance of the offence only exercised jurisdiction rightly vested in him. He was not barred from taking cognizance of the complaint by the provisions of section 195 (1) (b), Criminal Procedure Code.

Frank Anthony, R. L. Kohli and *J. C. Talwar*, Advocates, for Appellant
Respondent No. 1 in Person

O. P. Rana, for Respondent No. 2 (State)

G. R.

Appeal dismissed.

[SUPREME COURT.]

K. Subba Rao, C.J. and
J. M. Shelat, J.
22nd August, 1966.

Hasan Nurani Malak v.
Assistant Charity Commissioner,
Nagpur.
C.A. No. 498 of 1964.

Bombay Public Trusts Act (1950), section 19—Madhya Pradesh Public Trust Act (XXX of 1951), sections 5, 6, 7 and 8—The Bombay Public Trust (Unification Amendment) Act, 1959—Definition of Public Trust under section 2 (4) of the M.P. Act—Bombay Societies Registration Act (VI of 1960), section 86.

Sections 6 and 7 of M. P. Public Trust Act enjoin upon the Registrar to record his finding. Such a finding may either be that the trust is a public trust or it is not. Section 7 (1) enjoins upon him to cause entries to be made in the register "in accordance with the findings recorded by him under section 6", and he is to publish the entries when made in the register. The register prescribed no doubt is a register of public trusts. If the finding of the Registrar is that a particular trust is not a public trust, does he not have to make an entry of his finding in the register or has he to make an entry in that register only when his finding is a positive one that the trust is a public trust? It will be noticed that there is nothing in section 7 (1) to show that he is required to make an entry only if the finding is in the affirmative. On the other hand sub-section (1) of section 7 expressly provides that he shall cause entries to be made in accordance with the findings recorded by him under section 6. Section 6 shows that he has to record his findings and the reasons therefor whatever the findings are, whether in the affirmative or in the negative. Since entries under section 7 (1) are to be made in accordance with such findings, either positive or negative, it follows that entries have to be made irrespective of whether the trust is found to be a public trust or not. To say that he is required to make an entry of a finding only if the finding is that the trust is a public trust would be contrary to the express language of sections 6 and 7 and would unnecessarily curtail the language and the scope of the two sections. This construction is also supported by section 8. Under that section, though it is the entry made under section 7 which has been given finality a right of suit is conferred on both the working trustee and all persons having interest in the trust or any property belonging to it and who is aggrieved 'by any finding.'

The High Court was, therefore, in error when it held that the Registrar was not obliged to make the entry as his finding was in the negative. In our view, reading sections 5, 6, 7 and 8 of the M.P. Act it is clear that the Registrar is enjoined upon to make an entry in the register of public trusts irrespective of whether his finding is in the affirmative or in the negative. For the entry he has to make is the entry "in accordance with his finding" whatever that finding is.

The inquiry held by the Registrar under the M.P. Act was indisputably "a thing duly done" under that Act. The inquiry and its result having been saved by section 86 (3) (a) they continue to be governed by the M.P. Act in spite of its ceasing to apply in Vidarbha. As we have already held it was obligatory on the Registrar to have made an entry of his finding in the register of public trusts, maintained by him under that Act though the finding was that the trust was not a public trust.

That being the position, the inquiry is saved by sub-clause (a) of section 86 (3) and it is still pending and is governed by the M.P. Act. In the result a fresh inquiry under the Bombay Act while the proceeding under the M.P. Act is still pending was not competent and the Assistant Charity Commissioner was precluded from entertaining it.

S. T. Desai, Senior Advocate with M/s. J. B. Dadachanji & Co., Advocates,
for Appellant.

S.—N R C

B L R Aiyengar, Senior Advocate with *B R G K Achar*, Advocate, for Respondent No 1

N C Chatterjee, Senior Advocate with *Shankar Anand*, *Asghar Ali*, and *Ganpat Rai*, for Respondents Nos 2 to 5

G R

Appeal allowed

[SUPREME COURT]

K N Wanchoo, *J C Shah*
and *R S Bachawat*, JJ
2nd September, 1966

Gomathunajagam Pillai v
Palaniswami Nadar
C A. No 1043 of 1965

Contract Act (IX of 1872), section 55—Time as the essence of the contract

By Majority —In the present case there is no express stipulation, and the circumstances are not such as to indicate that it was the intention of the parties that time was intended to be of the essence of the contract. It is true that even if time was not originally of the essence, the appellants could by notice served upon the respondent call upon him to take the conveyance within the time fixed and intimate that in default of compliance with the requisition the contract will be treated as cancelled. As observed in *Stuckney v Keeble* L R (1915) A C 386 where in a contract for the sale of land the time fixed for completion is not made of the essence of the contract, but the vendor has been guilty of unnecessary delay, the purchaser may serve upon the vendor a notice limiting a time at the expiration of which he will treat the contract as at an end. In the present case appellants 1 and 2 have served no such notice, by their letter dated 30th July, 1959, they treated the contract as at an end. If the respondent was otherwise qualified to obtain a decree for specific performance, his right could not be determined by the letter of appellants 1 and 2.

But the respondent has claimed a decree for specific performance and it is for him to establish that he was, since the date of the contract, continuously ready and willing to perform his part of the contract. If he fails to do so, his claim for specific performance must fail.

The respondent must in a suit for specific performance of an agreement plead and prove that he was ready and willing to perform his part of the contract continuously between the date of the contract and the date of hearing of the suit. On this part of the case the trial Court recorded a clear finding against the respondent that he was at no time ready and willing to perform his part of the contract. The High Court did not consider the effect of this finding upon the claim of the respondent and without expressing dissent with that finding granted a decree for specific performance to the respondent.

The trial Court has therefore come to the conclusion, having regard to the admission made by the respondent, his subsequent conduct and other circumstances, that the respondent was not ready and willing to take the sale deed at any time. The finding is based on *prima facie* good evidence and the inference raised by the trial Court is reasonable. It would be difficult for this Court to set aside the finding without reappraisal of the evidence. Counsel for the appellant has not asked us—and we think that in the circumstances he was right in so doing—to review the evidence on the record and to arrive at an independent conclusion on the plea of readiness and willingness of the respondent on the evidence, as the learned Judges of the High Court may have done if the question was raised before them. The finding of the trial Court that after entering into the contract the respondent was not ready and willing to perform his part of the contract must be accepted.

H R Gokhale, Senior Advocate (*R Ganapathy Iyer*, Advocate, with him), for Appellants

A K Sen, Senior Advocate (*R Gopalakrishnan*, Advocate, with him), for Respondent

G R.

Appeal allowed

[SUPREME COURT.]

K. N. Wanchoo, J. C. Shah and
R. S. Bachawat, JJ.
5th September, 1966.

State of M.P. v.
Kaluram.
C.A. No. 559 of 1964.

Contract Act (IX of 1872), sections 140 and 141—Scope.

If the creditor has lost or has parted with the security without the consent of the surety, the latter is, by the express provision contained in section 141, Contract Act, discharged to the extent of the value of the security lost or parted with.

The State had a charge over the goods sold as well as the right to remain in possession till payment of the instalments. When the goods were removed by Jagatram that security was lost and to the extent of the value of the security lost the surety stood discharged. In the present case the State has not produced the accounts furnished under rule 16 of Rules under the Forest Act by the contractor relating to the quantity of goods removed by Jagatram. We must in the circumstances hold that the entire quantity contracted to be sold to Jagatram had been removed, and the surety is, because the State has parted with the security which it held, discharged from liability to pay the amount payable under the terms of the contract.

Referring to *Wulff and Billing v. Jay*, (1872) L.R. 7 Q.B. 756, the Court held subject to certain variations, which are not material for the matter under discussion section 141 of the Contract Act incorporates the rule of English law relating to the discharge from liability of a surety when the creditor parts with or loses the security held by him.

The Forest Officers of the State of Madhya Pradesh parted with the goods, before receiving payment of the amount due by the contractor Jagatram. Thereby the charge in favour of the State was seriously impaired and the statutory power to sell the goods for non-payment of the amount remaining due became, for all practical purposes, ineffective. Again under the terms of the contract the Forest Authorities had the right to prevent removal of goods sold until the price was paid: that right was also lost. The right conferred by section 83 of the Forest Act and under the terms of the contract to prevent removal and right to sell goods for non-payment of the price, coupled with the charge on the goods, constituted the security of the State and that security was lost because the Forest Officers permitted removal of the goods by the contractor.

We therefore agree with the High Court that the surety Kaluram stood discharged from liability to pay the amount undertaken by him under the terms of the surety bond because the Forest Authorities of the State had parted with the security which they possessed for recovery of the amount due from the contractor.

B. Sen, Senior Advocate (J. P. Dube, Government Advocate of Madhya Pradesh and I. N. Shroff, Advocate, with them), for Appellant.

B. C. Misra, Senior Advocate (S. S. Shukla, Advocate, with him), for Respondent.

G.R.

Appeal dismissed.

[SUPREME COURT.]

V. Ramaswami, V. Bhargava
and Raghubar Dayal, JJ.
6th September, 1966.

K. P. Raghavan v.
M. H. Abbas.
Crl.A. No. 125 of 1966.

Penal Code (XLV of 1860), section 330—Criminal Procedure Code (V of 1898), sections 207-A and 209.

It will thus be seen that there was nothing in the prosecution or the defence case which made the prosecution case inherently improbable, and there could be no justification for the Magistrate to hold that no Court could reasonably come to a conclusion on this material that the prosecution case had been established. It is clear that in these circumstances, what the Magistrate did was to appropriate to

himself the function of judging whether the prosecution evidence was to be believed or whether the defence evidence was to be believed in preference, and consequently the evidence of the prosecution witness who gave eye witness account of the offence was unreliable. No doubt a Magistrate enquiring into a case under section 209, Criminal Procedure Code is not to act as a mere Post Office, and has to come to a conclusion whether the case before him is fit for commitment of the accused to the Court of Session; but in arriving at that conclusion, it is not the function of an enquiring Magistrate to weigh the *pros* and *cons* of the prosecution and defence evidence and to discharge the accused in reliance because in his view the defence evidence was better than the prosecution evidence.

In the case before us as we have already held above, there was direct evidence of prosecution witnesses to support the charge in the complaint and it could not be held that the witnesses who gave the evidence were such that there was no reasonable possibility of their being believed by any Court. Consequently, it is clear that the Magistrate had committed an error in discharging the appellants, and the Sessions Judge was right in ordering commitment of the appellants to the Court of Session for trial. His order was also rightly upheld by the High Court.

We are only concerned with the interpretation of section 209 and we have indicated above how the jurisdiction under that section should be exercised by a Magistrate.

A S R Chari, Senior Advocate (*Sardar Bahadur*, Advocate, with him), for Appellants.

B R L Iyengar Senior Advocate (*A V V Nair*, Advocate, with him), for Respondent No 1.

V A Seyid Muhammad Advocate General for the State of Kerala (*M R Krishna Pillai*, Advocate, with him) for Respondent No 2.

G R.

Appeal dismissed

[SUPREME COURT]

K Subba Rao C.J. and
J M Shelat J.
6th September, 1966

*Sri Vedagiri Lakshminarasimha
Swami Temple v Induru Pattabhi
rami Reddi*
C.A. No 605 of 1964

Madras Hindu Religious and Charitable Endowments Act (XIX of 1951), sections 87, 93—Section 92 Civil Procedure Code—Amending Act (II of 1927), section 73—Madras Act X of 1946

Chapter VII only provides for a strict supervision of the financial side of the administration of an institution. The scope of the Auditor's investigation is limited. It is only an effective substitute for the trustee himself furnishing an audited account. It is concerned only with the current management of a trustee. It does not even exonerate a trustee of his liability to render accounts except to a limited extent mentioned in sub section (7) of section 74, an order of surcharge under that section against a trustee shall not bar a suit against him except in matters finally dealt with in such order. This shows by necessary implication that a suit can be filed for accounts against a trustee in other respects. In any view, it has nothing to do with the management of a temple by a previous trustee. It is contended that under sub section (5) of section 74 the trustee or any other person aggrieved by such order may file a suit in the civil Court or prefer an appeal to the Government questioning the order of the Commissioner and, therefore, it is open to any member of the public to file a suit under the Act. "Any person" there only refers to a person mentioned in sub section (3) of section 74, i.e., a person who is guilty of misappropriation.

We therefore, hold that Chapter VII of the Act has no bearing on the question of liability of an ex-trustee to render account to the present trustee of his management. Chapter VII does not provide for determining or deciding a dispute in respect of such rendition of accounts. If so, it follows that section 93 of the Act is not a bar to the maintainability of such a suit.

P. Ram Reddy, Senior Advocate (*A. V. V. Nair*, Advocate, with him), for Appellant.

H. R. Gokhale, Senior Advocate (*S. P. R. Vital Rao*, *K. Rajendra Chaudhury* and *K. R. Chaudhuri*, Advocates, with him), for Respondent.

G.R.

Appeal allowed.

[SUPREME COURT.]

K.N. Wanchoo, J.C. *Shah* and
R. S. Bachawat, JJ.
6th September, 1966.

Kurpuswami Chettiar v.
A.S.P.A. Arumugam Chettiar.
C A. No. 521 of 1964.

Transfer of Property Act (IV of 1882), section 123—Deed of release—Vitiated by misrepresentation—Whether a valid conveyance.

In the present case, the release was without any consideration. But property may be transferred without consideration. Such a transfer is a gift. Under section 123 of the Transfer of Property Act (IV of 1882), a gift may be effected by a registered instrument signed by or on behalf of the donor and attested by at least two witnesses. Consequently, a registered instrument releasing the right, title and interest of the releasor without consideration may operate as a transfer by way of a gift, if the document clearly shows an intention to effect the transfer and is signed by or on behalf of the releasor and attested by at least two witnesses. Exhibit B-1 stated that the releasor was the owner of the properties. It showed an intention to transfer his title and its operative words sufficiently conveyed the title. The instrument, on its true construction, took effect as a gift. The gift was effectively made by a registered instrument signed by the donor and attested by more than two witnesses.

Now, it cannot be disputed that a release can be usefully employed as a form of conveyance by a person having some right or interest to another having a limited estate, e.g., by a remainderman to a tenant for life, and the release then operates as an enlargement of the limited estate. But in this case, we are not concerned with a release in favour of the holder of a limited estate. Here, the deed was in favour of a person having no interest in the property and it could not take effect as an enlargement of an existing estate. It was intended to be and was a transfer of ownership. A deed called a deed of release can, by using words of sufficient amplitude, transfer title to one having no title before the transfer. The cases relied upon by Counsel are not authorities for the proposition that the operative words of a release deed must be ignored. In *S.P. Chinnambiar's case*, I.L.R. (1954) Mad. 500 : (1953) 2 M.L.J. 387, 391, the document could not operate as a transfer, because a transfer was hit by section 34 of the Court of Wards Act, and viewed as a renunciation of a claim, it could not vest title in the release. In *Hutchi Gowder v. Bheema Gowder*, I.L.R. (1959) Mad. 552 : (1959) 2 M.L.J. 324, 337, the question was whether a covenant of further assurance should be enforced by directing the defendant to execute a release deed or a deed of conveyance, and the Court held that the defendant should execute a deed of conveyance. These decisions do not lay down that a deed styled a deed of release cannot, in law, transfer title to one who before the transfer had no interest in the property.

C. B. Agarwala, Senior Advocate, (*T. R. Ramachandra*, Advocate and *O.C. Mathur*, Advocate of *M/s J. B. Dadachanji & Co.*, with him), for Appellant.

S. V. Gupta, Solicitor-General of India (*R. Ganapathy Iyer*, Advocate, with him), for Respondents.

G.R.

Appeal dismissed.

[SUPREME COURT]

V Ramaswami, V Bhargava and
Raghubar Dayal, JJ
6th September, 1966

Ram Baran Prasad b
Ram Mohit Hazra
CA No 609 of 1964

Specific Relief Act (I of 1877), sections 23 B, 27 B—Indian Contract Act (IX of 1872), sections 37 and 40—Whether the covenant of the pre-emption offends the rule against perpetuities and is therefore void and not enforceable even against the original contracting parties

It is obvious that in these clauses the expression "parties" cannot be restricted to the original parties to the contract but must include the legal representatives and assignees of the original parties. There is hence no reason why the same expression should be given a restricted meaning in the pre-emption clause which is the subject-matter of interpretation in the present appeal. On behalf of the respondents Mr N C. Chatterji rightly argued that the pre-emption clause was based upon the ground of vicinage and this circumstance would also suggest that the intention of the parties was that the pre-emption clause should be binding upon the heirs and successors in-interest and the assignees of the original parties to the contract.

We are accordingly of the opinion that the covenant for pre-emption in this case does not offend the rule against perpetuities and cannot be considered to be void in law. The view that we have expressed is borne out by the decisions of the Calcutta High Court in *Ali Hossain Miya v Raj Kumar Haldar*, I L R (1943) 2 Cal 605, of the Allahabad High Court in *Aulad Ali v Ali Athar*, I L R (1927) 49 All 527, and of the Madras High Court in *Chinna Munuswami Nayudu v Sagalaguna Nayudu*, I L R (1926) 49 Mad 387 51 M L J 229. Mr Bishen Narain relied on the decision of the Calcutta High Court in *Nobin Chandra Soot v Nabab Ali Sarkar*, (1901) 5 C W N 343, and the judgment of the Allahabad High Court in *Gopi Ram v Jeot Ram*, I L R (1923) 45 All 478. For the reasons we have already stated we hold that the later decisions in *Ali Hossain Miya v Raj Kumar Haldar*, I L R (1943) 2 Cal 605, in *Chinna Munuswami Nayudu v Sagalaguna Nayudu*, I L R (1926) 49 Mad 387 51 M L J 229, and in *Aulad Ali v Ali Athar*, I L R (1927) 49 All 527, correctly state the law on the point.

Bishan Narain, Sen or Advocate (B P Maheshwari, Advocate, with him), for Appellant

N C Chatterjee, Senior Advocate (Sukumar Chose, Advocate, with him), for Respondents Nos 1 and 2

GR

Appeal dismissed

[SUPREME COURT]

K N Wanchoo J C Shah and
R S Bachawat, JJ
12th September, 1966

Cherumanahil Lakshmi v
Myllyil Kunnamankandy Narayani (dead)
CA No 567 of 1964

Malabar Tenancy Act, 1929 (Madras Act) (XIV of 1930), sections 21 read with section 3 (15)—Kerala Land Reforms Act, 1963 (I of 1964)—Kanam Kuzhikanam—Transfer of Property Act, 1882.

On the question whether a transaction is a kanam kuzhikanam or a usufructuary mortgage, the name given to it by the parties is a relevant, though not always a decisive, consideration. If the parties described the transaction to be a kanam kuzhikanam it is a valuable indication that they intended it to be such and not a usufructuary mortgage. If the document purports to be a mortgage, section 12 of the Act allows the parties to prove that it is, in substance, a kanam kuzhikanam or other lease. But if the document purports to be or is, on its true construction, a kanam kuzhikanam or other lease, section 12 has no application and full effect must be given to the document according to its tenor.

Significantly, the parties did not describe the transactions to be a mortgage otti, panayam or a kyvasam panayam. Instead, they described the transactions as kanam kuzhikanam and the amounts paid to the transferees as kanaritham. Exhibits A 1 and B 1 did not purport to be and were not transactions for securing

debts. We agree with the Courts below that the transactions were kanam-kuzhi-kanam and were not as usufructuary mortgages.

H.R. Gokhale, Senior Advocate (*A. G. Pudissery*, Advocate, with him), for Appellants.

P. Ram Reddy, Senior Advocate, (*K. P. Madhava Menon* and *A. V. V. Nair*, Advocates, with him), for Respondents Nos. 2 to 13.

G.R.

Appeal dismissed.

[SUPREME COURT.]

K.N. Wanchoo, *J.C. Shah*
and *R.S. Bachawat*, JJ.
13th September, 1966.

Sukh Lal v.
The State Bank of India, Calcuta.
C.As.Nos.582-583 of 1964.

Displaced Persons (Debt Adjustment) Act (LXX of 1951), section 5—Definition of 'displaced debtor' and 'debt' under section 2.

We are unable to agree with the contention of the Bank that for a person to be a displaced debtor under the Displaced Persons (Debt Adjustments) Act (LXX of 1951), he must have before migration to India a place of residence only in the territory which later was included in Pakistan, and had no place of residence in the territory which is now India. The words of the definition in section 2 (i) read with section 2 (6) are sufficiently wide to include the case of a person who had a place of residence in India as well as a place of residence in an area now forming part of Pakistan, provided that such person was displaced from that latter residence because of the setting up of the two Dominions or on account of civil disturbances or fear of such disturbances.

The Tribunal apparently accepted the testimony of the witnesses who deposed that Sukh Lal had a place of residence at Harunabad. The High Court disagreed with that view, for in their opinion Sukh Lal was not proved to have actually resided immediately before the partition at Harunabad. But the test of actual residence before partition, applied by the High Court was, in our judgment, erroneous. On a consideration of the evidence, we are of the view that Sukh Lal has established his status as a displaced debtor and the High Court was in error in setting aside the order of the trial Court in so far as it related to Sukh Lal.

In our view, therefore, the appeal of Sukh Lal must be allowed and the appeal filed by Karam Chand and Prabh Dayal must be dismissed. The order passed by the High Court will stand modified and the Court of First Instance will determine the final liability of Karam Chand and Prabh Dayal for the debt due to the Bank in accordance with the provisions of section 22 of the Displaced Persons (Debt Adjustments) Act (LXX of 1951).

There is little doubt that on account of circumstances, over which the appellants had no control, property of considerable value belonging to them had been destroyed. In the circumstances there will be no order as to costs in this Court and in the High Court till this date.

A. K. Sen, Senior Advocate, *Miss Uma Mehta* and *S. K. Mehta* and *K. L. Mehta*, Advocates, with him), for Appellants.

H. L. Anand and *K. Baldev Mehta*, Advocates, for Respondent No. 1

G.R.

Order accordingly.

[SUPREME COURT.]

M. Hidayatullah, *S.M. Sikri*
and *Raghubar Dayal*, JJ.
10th October, 1966.

Mahadu Rupila Deore v.
The State of Maharashtra.
Cr.A. No. 269 of 1964.

Penal Code (XLV of 1860), section 161 and section 5 (2) of the Prevention of Corruption Act (II of 1947)—Presumption under section 4 (1) of the Prevention of Corruption Act.

Really, the whole object of laying the trap in bribery cases, is to secure an independent witness with respect to the transaction of the demand and the giving of bribe. The result of Mudaliar's agreeing to the suggestion of Shantilal is that there is no

independent evidence in corroboration of the statement of Shantilal. It may be that it is not necessary for the prosecution to lead corroborative evidence in cases where a presumption under section 4 (1) of the Act arises against the accused, but in cases where the accused leads evidence to rebut the presumption the importance of corroborative evidence cannot be gainsaid. The Court has to weigh the probabilities of the case and to see whether the preponderance of the probabilities lies with the defence version or with the prosecution version irrespective of the presumption which is sought to be rebutted by the accused per se. When there is no evidence in corroboration of the statement of Shantilal it is difficult to say that his story is a probable story. In fact his desire not to have a panch present leads to the inference that he was afraid of the panch not supporting the version he would like to put forward. The advantage of this omission must go in favour of the appellant.

The High Court, curiously enough, did not deal with this aspect of the matter. It simply referred to it as a peculiarity by observing, after narrating the prosecution case:

'When considering the probabilities of the case the recovery of the money is not of significance. What is of significance is in what connection the money was being paid and in that respect the statement of an independent witness would have been of value. The High Court refers to the contention on behalf of the appellant in this connection and brushes it aside by saying 'This is besides the point'.

Dealing so lightly with this important aspect of the case sufficiently vitiates the judgment of the High Court. It is also significant that the High Court has nowhere referred to the credibility of the complainant, a witness who has made some inconsistent statements and had a few convictions to his credit.

We are therefore of the view that the learned Special Judge had dealt with the matter fully and given adequate reasons for holding that the appellant's version was to be preferred to the prosecution case and that the High Court was not justified in setting aside that view. The result is that the appeal is allowed and the order of the High Court is set aside. The appellant is acquitted of the offences under section 161, Indian Penal Code and section 5 (1) (b) read with section 5 (2) of the Act. Fine, if paid, to be refunded as the appellant is already on bail.

N D Karkhanis M/s *Dadacharji & Co*, Advocate, for Appellant
O P Rana and *R N Sachthy* Advocates for Respondent

G R

1

Appeal allowed

the Company Law Committee in their report of 1952 where the Committee have noted that the need for a provision for investigation was generally recognized. While recognizing that in some cases the use of the powers of inspection and investigation may shake the credit of the company and affect its competitive position the Committee observed that such a risk "should not, however, deter us from considering the desirability of conferring adequate powers on an appropriate authority to investigate the affairs of a company where such investigation is *prima facie*, called for. Similar observation are also to be found in the Report of the Company Law Committee presented to the British Parliament in June 1962 in regard to a similar power of investigation under section 165 (b) of the English Act. In the context of the rapid pace at which industrialisation is taking place in the country and companies are floated with share capital of the size and volume not conceived of only a few years ago, chances of misuse of power, maladministration and malpractices have considerably increased. A safer and such as a power of investigation becomes not only necessary but also inevitable for the protection of an increasing number of shareholders, creditors and other persons interested in such large companies. Considered from this angle there would be no difficulty in holding that even if the provision as to investigation amounts to a restriction, it is a reasonable restriction, especially so when the power under section 237 (b) as stated earlier can only be exercised on an opinion formed on the objective test of the existence of circumstances suggesting things set out in clause (b) of section 237. It is not therefore possible to uphold the challenge to the clause under either of these two heads.

Though the contentions regarding *mala fides* and the constitutional invalidity of section 237 (b) are not upheld, the appellants succeed in the other two contentions. The appeal is allowed and the impugned order is set aside. Since the appellants have partly succeeded and partly failed, there will be no order as to costs.

ORDER.

In accordance with the opinion of the majority the appeal is allowed but there will be no order as to costs.

K.G.S.

Appeal allowed

THE SUPREME COURT OF INDIA.

(Original Jurisdiction.)

PRESENT :—P. B. GAJENDRAGADKAR, *Chief Justice*, K. N. WANCHOO, M. HIDAYATULLAH, V. RAMASWAMI AND P. SATYANARAYANA RAJU, JJ.

Durgadas Shirali

.. *Petitioner**

v.

The Union of India and another

.. *Respondents.*

Constitution of India (1950), Article 359 (1)—Order, dated 3rd November, 1962 as amended on 11th November, 1962 issued by the President of India under—Legal effect.

Defence of India Rules (1962), rule 30 (1) (b)—Need for detention of a citizen under—Political association of the citizen and his membership of a particular political group—If a relevant consideration.

During the pendency of the Presidential Order, dated 3rd November, 1962, as amended on 11th November, 1962, issued under Article 359 (1) of the Constitution of India, the validity of the Defence of India Rules or any rule or order made thereunder cannot be questioned on the ground that it contravenes Articles 14, 19, 21 and 22 of the Constitution of India. But this limitation cannot preclude a citizen from challenging the validity of the Defence of India Rules or any rule or order made thereunder on any ground other than the contravention of Articles 14, 19, 21 and 22. For instance a citizen will not be deprived of his right to move an appropriate Court for a writ of *habeas corpus* on the ground that his detention has been ordered *mala fide*. Similarly it will be open to the citizen to challenge the order of detention on the ground that any of the grounds given in the order of detention is irrelevant and there is no real and proximate connection between the ground given and the object which the Legislature has in view.

Where a District Magistrate passed an order under rule 30 (1) (b) of the Defence of India Rules for the detention of the petitioner on the ground that he was satisfied that the Leftist Wing of the

Communist Party in India constituted a real danger to external and internal security of India as that Party formed at Peking's behest was preparing for a widespread agitation for establishing Communist regime by subversion and violence and that he was further satisfied from reports that the petitioner who was the Secretary of the Leftist Wing of the Communist Party was likely to act in a manner prejudicial to the Defence of India and Civil Defence, India's relation with Foreign powers, public safety and the maintenance of public order

Held the order of detention was valid.

It would not be correct to state that the activities of the Leftist Wing of the Communist Party cannot in any circumstances be illegal and would necessarily be irrelevant merely because the Government of India has not declared the Party illegal or imposed a ban on it. In considering the question whether the petitioner was acting in a manner prejudicial to the Defence of India it was open to the Magistrate to take into account the reports which he had received as to the political association of the petitioner, his political friends and his political loyalty. In considering the circumstance that the petitioner was a member of the Leftist Wing of the Communist Party which, according to reports, was preparing for a widespread agitation the District Magistrate was not applying his mind to any irrelevant circumstance with regard to the need for detention of the petitioner. This political association of the petitioner and his membership of a particular political group was a relevant consideration in the matter of detention of the petitioner. This ground has close and proximate connection with the security of State and maintenance of public order as contemplated by rule 30 of the Defence of India Rules.

Petition under Article 32 of the Constitution of India for enforcement of Fundamental Rights

R. K Garg, M K Ramamurthi, S C Agarwal and D P Singh, Advocates of Messrs Ramamurthi & Co, for Petitioner

G G Kaslwal, Advocate-General for the State of Rajasthan (R. N Sachthy, Advocate, with him), for Respondent No 2

The Judgment of the Court was delivered by

Ramaswami, J—In this case the petitioner—Durgadas Shiralu has obtained in a rule calling upon the respondents to show cause why a writ of *habeas corpus* should not be issued under Article 32 of the Constitution directing his release from detention under an order passed by the District Magistrate of Bhilwara, Rajasthan under rule 30 (1) (b) of the Defence of India Rules. Cause has been shown by the Advocate-General of Rajasthan on behalf of the respondents to whom notice of the rule was ordered to be given

The petitioner was arrested on 2nd January, 1965 at Jaipur in pursuance of an order dated 29th December, 1964 made by the respondent No 3, Shri Narayan Das Mehta, District Magistrate of Bhilwara which states as follows —

"It is reliably brought to my notice that the Leftist Wing of the Communist Party has been carrying on anti national and pro-Chinese propaganda and are preparing to act as Peking's member. The party having been formed at Peking's behest are preparing for widespread agitation with the object of establishing communist regime by subversion and violence. I, therefore, come to the irresistible conclusion that the Leftist Communist Party constitutes a real danger to external and internal security of the country and that it has become necessary to take immediate action.

I am also satisfied from the report that Shri Durgadas Shiralu of Bhilwara is the Secretary of the Leftist Wing of the Communist Party and he is likely to act in a manner which is prejudicial to the Defence of India and Civil Defence, India's relations with Foreign powers, public safety and maintenance of the public order

I, Narayan Das Mehta, District Magistrate, Bhilwara in exercise of the powers delegated to me under rule 30 (1), clause (b) of the Defence of India Rules, 1962 vide Government of Rajasthan Notification No F 7/1(16) Home (A.Gr I) 63 dated the 4th November, 1963 and all other powers enabling me that behalf direct the Superintendent of Police, Bhilwara that Shri Durga Das Shiralu be arrested and detained in the Bhilwara Jail until further orders.

On 13th January, 1965 the order of the District Magistrate was reviewed by the Reviewing Authority who recommended that the detention order dated 29th December, 1964 should be confirmed. The State Government confirmed the detention order by its order No F 7/1 (19) Home (A.Gr I) 65 dated 22nd January, 1965.

On behalf of the petitioner it was contended by Mr. Garg that the District Magistrate had not applied his mind to the specific activities of the petitioner and there was complete absence of material before the District Magistrate to suggest that the conduct of the petitioner would be "prejudicial to the Defence of India and Civil Defence, India's relations with foreign powers, public safety and the maintenance of the public order". It was, therefore, submitted on behalf of the appellant that the order of detention made by the District Magistrate was *mala fide* and illegal. Mr. Garg submitted, in the second place, that one of the grounds mentioned in the order of detention was that the petitioner was a member of the Leftist Wing of the Communist Party of India and Secretary of the local branch of that party at Bhilwara. The Leftist Communist Party has been carrying on anti-national and pro-Chinese propaganda and the District Magistrate was of the opinion that the Leftist Communist Party, therefore, constituted a real danger to external and internal security of the country. It was submitted by Mr. Garg that the Leftist Wing of the Communist Party had not been declared illegal or banned by the Government of India and the membership of the petitioner of the Leftist Communist Party of India was, therefore, not a relevant ground for the order of detention.

Before proceeding to deal with these points raised on behalf of the petitioner it is necessary to state that in *Makhan Singh Tarsikka v. The State of Punjab*¹ this Court had occasion to consider the legal effect of the Proclamation of Emergency issued by the President on 26th October, 1962 and two orders of the President—one dated 3rd November, 1962 and the other dated 11th November, 1962 issued in exercise of the powers conferred by clause (1) of Article 359 of the Constitution. It was held by this Court that the sweep of Article 359 (1) and the Presidential Order issued under it is wide enough to include all claims made by citizens in any Court of competent jurisdiction when it is shown that the said claims cannot be effectively adjudicated upon without examining the question as to whether the citizen is, in substance, seeking to enforce fundamental rights under Articles 14, 19, 21 and 22. It was pointed out that during the pendency of the Presidential Order the validity of the Ordinance or any rule or order made thereunder cannot be questioned on the ground that it contravenes Articles 14, 21 and 22. But this limitation cannot preclude a citizen from challenging the validity of the Ordinance or any rule or order made thereunder on any other ground. If the petitioner seeks to challenge the validity of the Ordinance, rule or order made thereunder on any ground other than the contravention of Articles 14, 21 and 22, the Presidential Order cannot come into operation. It is not also open to challenge the Ordinance, rule or order made thereunder on the ground of contravention of Article 19, because as soon as a Proclamation of Emergency is issued by the President under Article 358 the provisions of Article 19 are automatically suspended. But a petitioner can challenge the validity of the Ordinance, rule or order made thereunder on a ground other than those covered by Article 358, or the Presidential Order issued under Article 359 (1). Such a challenge is outside the purview of the Presidential Order. For instance, a citizen will not be deprived of his right to move an appropriate Court for a writ of *habeas corpus* on the ground that his detention has been ordered *mala fide*. Similarly, it will be open to the citizen to challenge the order of detention on the ground that any of the grounds given in the order of detention is irrelevant and there is no real and proximate connection between the ground given and the object which the Legislature has in view.

It is contended, in the first place, on behalf of the petitioner, that the order of detention is bad because the District Magistrate had not applied his mind to the specific activities of the petitioner. It was pointed out that in the order of detention the District Magistrate has mainly dealt with the activities of the Leftist Wing of the Communist Party of India which was carrying on anti-national and pro-Chinese propaganda. The District Magistrate proceeds to say that the party was formed at Peking's behest and was preparing for widespread agitation with the object of establishing communist regime by subversion and violence. The District Magistrate, therefore, reached the conclusion that the Leftist Wing of the Communist

Party constituted a real danger to external and internal security of the country. So far as the petitioner is concerned the District Magistrate has described him as Secretary of the Leftist Wing of the Communist Party and has proceeded to state that he was satisfied that the petitioner was likely to act in a manner which was prejudicial to the Defence of India and Civil Defence, India's relations with foreign powers, public safety and the maintenance of the public order. In reply to the petition of the detenu the District Magistrate, Bhilwara has filed an affidavit in this Court. In paragraph 3 of the affidavit the District Magistrate has stated that he was satisfied from the reports that the petitioner was carrying on anti national and pro Chinese propaganda as a member of the Leftist Wing of the Communist Party. In paragraph 5 the District Magistrate has stated that he passed the order of detention after satisfying himself on the reports that the petitioner was the Secretary of the Leftist Wing of the Communist Party of India, Bhilwara branch and that he was likely to act in a manner prejudicial to Defence of India and Civil Defence, India's relations with Foreign powers public safety and the maintenance of public order. In view of the affidavit of the District Magistrate it is not possible for us to accept the argument of Mr Garg that the District Magistrate did not apply his mind to the specific activities of the petitioner and that he made the order of detention solely on the ground that the Leftist Wing of the Communist Party of India was carrying on anti national and pro Chinese propaganda.

It was next argued on behalf of the petitioner that the Leftist Wing of the Communist Party of India has not been declared illegal by the Government of India and the party has not been banned. It was submitted, therefore, that membership of that party was not *per se* illegal and the order of detention of the petitioner cannot be legally based upon this ground. In other words, it was submitted by Mr Garg that the ground that the petitioner was the Secretary of the Leftist Wing of the Communist Party of India was irrelevant for the purpose of rule 30 of the Defence of India Rules. The argument was put forward that if this ground was irrelevant for the purpose of the Rule or was wholly illusory the order of detention as a whole was vitiated and must be quashed by grant of a writ of *habeas corpus*. In support of his argument Mr Garg referred to the decision of this Court in *Shibban Lal Saxena v. The State of Uttar Pradesh*¹. We are unable to accept the argument of Mr Garg as correct. It is not correct to state that the activities of the Leftist Wing of the Communist Party cannot in any circumstances be illegal and would necessarily be irrelevant merely because the Government of India has not declared the party illegal or imposed a ban. In considering the question whether the petitioner was acting in a manner prejudicial to the Defence of India within the meaning of rule 30 of the Defence of India Rules it is open to the District Magistrate to take into account the reports which he had received as to the political association of the petitioner, his political friends and his political loyalties. In considering the circumstance that the petitioner was a member of the Leftist Wing of the Communist Party of India which, according to the said reports, was preparing for a widespread agitation with the object of establishing communist regime by subversion and violence the District Magistrate was not applying his mind to any irrelevant circumstance with regard to the need for detention of the petitioner under the Defence of India Rules. In our opinion, in the light of the reports received by the District Magistrate the political association of the petitioner and his membership of a particular political group is a relevant consideration in the matter of detention of the petitioner. This ground has close and proximate connection with the security of State and maintenance of public order as contemplated by rule 30 of the Defence of India Rules. In our opinion, Mr Garg is unable to make good his submission on this aspect of the case.

For these reasons we hold that the petitioner has not made out a case for the grant of a writ under Article 32 of the Constitution. The Writ Petition fails and is accordingly dismissed.

V K.

Petition dismissed

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT:—P. B. GAJENDRAGADKAR, *Chief Justice*, K. N. WANCHOO, M. HIDAYATULLAH, V. RAMASWAMI AND P. SATYANARAYANA RAJU, JJ.

Durga Prasad, etc.

.. Appellants*

v.

H. R. Gomes, Superintendent (Prevention) Central Excise, Nagpur and another, etc.

.. Respondents.

Defence of India (Amendment) Rules (1963), rule 126-L (2) read with rule 156—Scope—If gives power to seize documents.

Customs Act (LII of 1962), sections 2 (34) and 110 (3)—Collector of Customs—If a 'proper officer' within section 110 (3)—Documents seized without authority by a Customs officer at Nagpur sent to Delhi for translation—Order of seizure of the same documents under section 110 (3) by Collector of Customs, Nagpur while they were a Delhi beyond his territorial jurisdiction—Validity.

Customs Act (LII of 1962), section 105—Scope—'Secreted', meaning of—Power of seizure under—Nature of—When can be exercised.

Rule 126-L (2) of the Defence of India (Amendment) Rules (1963) only gives authority to any person empowered by the Central Government in that behalf to seize any gold in respect of which there is suspicion of contravention of the Gold Control Rules along with the package, covering or receptacle but there is no provision in that rule for search or seizure of any documents. Nor can a power of seizure of documents be exercised by such officer under rule 156 of the Defence of India (Amendment) Rules, 1963 as an ancillary power for the effective exercise of the power under rule 126-L (2). The power granted under rule 156 is an ancillary or incidental power for making effective seizure of suspected gold. In other words, the power granted under rule 156 is the power to take such action as may be necessary for seizing the gold and does not include the power of seizure of documents which is not an ancillary but an independent power.

The Collector of Customs is a 'proper officer' in relation to the functions to be performed under the Customs Act and has as such power under section 110 (3) of the Customs Act to seize any document which in his opinion will be useful for any proceeding under the Customs Act.

Where certain documents believed to be connected with the contravention of Gold Control Rules seized under rule 126-L (2) of the Defence of India (Amendment) Rules by the Assistant Collector of Customs, Nagpur at Nagpur were sent to Delhi for proper translation by the Departmental Officer and while they were thus in Delhi the Collector of Customs, Nagpur, made an order of seizure of the same documents under section 110 (3) of the Customs Act.

Held, the order of seizure made under section 110 (3) of the Customs Act was a valid order.

No doubt when the seizure order was made under section 110 (3) the documents were not within Nagpur or the territorial jurisdiction of the Collector of Customs, Nagpur. But though the documents were sent to Delhi the legal position was that at Delhi the documents were in possession of a bailee for the limited purpose of translation but the legal possession was still with the Assistant Collector of Customs, Nagpur. It would follow that the legal effect of the order of seizure made by the Collector was the transfer of legal possession of the documents from the Assistant Collector to the Collector himself. Such a change of possession need not necessarily involve a physical transfer of possession but as a matter of law on and from the date of seizure the Collector exercised the full incidents of possession over the documents. The fact that the documents were retained at Delhi for a specific purpose will not affect the legality of the order of seizure.

The argument that the word 'secreted' in section 105 of the Customs Act is used in the sense of being hidden or concealed and that unless the Customs officer concerned had reason to believe that any document or thing was so concealed or hidden a search could not be made for such a document or thing is untenable. The word 'secreted' must be understood in the context in which the word is used in the section. In that context, it means 'documents which are kept not in the normal or usual place with a view to conceal them' or it may even mean 'documents or things which are likely to be secreted'. In

other words documents or things which a person is likely to keep out of the way or to put in a place where the officer of law cannot find it. It is in this sense that the word 'secreted' must be understood as it is used in section 105 of the Customs Act.

Nor can the argument be accepted that the power of search under section 105 of the Customs Act cannot be exercised unless the authorisation issued in that behalf specifies a document for which a search is to be made. The object of grant of power under section 105 is not search for a particular document but of documents or things which may be useful or necessary for proceedings either pending or contemplated under the Customs Act. At that stage it is not possible for the officer to predict or even to know in advance what documents could be found in the search and which of them may be useful or relevant. It is only after the search is made and documents found therein are scrutinised that their relevance or utility can be determined. To require, therefore, a specification or description of the documents in advance is to misapprehend the purpose for which the power is granted for effecting a search under section 105 of the Customs Act. The power granted under section 105 is therefore a power of general search. But it is essential that before this power is exercised the preliminary conditions required by the section must be strictly satisfied that is the officer concerned must have reason to believe that any documents or things which in his opinion are relevant for any proceedings under the Customs Act are secreted in the place searched.

Appeals from the Judgment and Orders dated the 24th/25th February, 1964 of the Bombay High Court (Nagpur Bench) at Nagpur in Special Civil Applications Nos 437, 448, 449 and 490 of 1963

G S Pathak, Senior Advocate (G L Sanghi and K Srinivasamurthy, Advocates and O C Mathur, Ravinder Narain and J B Dadachany, Advocates of M/s J B Dadachany & Co, with him), for Appellants

S V Gupte, Solicitor General of India and N S Bindra, Senior Advocate (B R G K Achar, Advocate, with them), for Respondents

The Judgment of the Court was delivered by

Ramaswami, J.—These appeals are brought by a certificate from the judgment of the High Court of Judicature at Bombay (Nagpur Bench) dated 25th February, 1964 in Special Civil Applications Nos 437, 448, 449 and 490 of 1963 wherein the respective appellants challenged the search and seizures carried out by the respondents at the residential cum business premises of the appellants in exercise of the power derived from rule 126-L (2) of the Defence of India (Amendment) Rules, 1963 (hereinafter called the 'Gold Control Rules') and sections 105 and 110 of the Customs Act, 1962 (hereinafter called the 'Customs Act')

Civil Appeal No 678 of 1965

This appeal arises out of Special Civil Application No 490 of 1963 which relates to the search and seizure of the premises of Sri Durga Prasad on 19th August, 1963 and 20th August, 1963. The authorisation was granted by the 1st respondent—Assistant Collector of Customs and Central Excise, Nagpur—to the second respondent—Superintendent of Customs and Central Excise—on 19th August, 1963 to search the appellant's premises "Shreeram Bhawan" and to seize and take possession of all gold ornaments, etc which were believed to have been kept in contravention of Gold Control Rules and also account books and documents. The authorisation was granted under Rule 126 L (2) of the Defence of India (Amendment) Rules, 1963 and reads as follows

To

Shri S H Joshi
Superintendent of Customs and Central Excise
Nagpur

Whereas information has been laid before me and on due inquiry thereupon I have been led to believe that the premises vaults/lockers specified below and said to be in possession and control of Shri R. B. Shri Ram Durga Prasad are used for storage of gold/gold ornaments in contravention of the provisions of the Gold Control Rules

Details of premises/vaults/lockers to be searched

Shri Ram Bhawan and premises appurtenances thereto including offices out houses etc Ramdaspath, Nagpur

This is to authorise and require you to enter the said premises with such assistance as shall be required, and to use, if necessary, reasonable force for that purpose, and to search every part of the said premises and to seize and take possession of all gold/gold ornaments along with the receptacle container or covering thereof which you may reasonably believe to be kept in contravention of the Gold Control Rules and also of such books of accounts, return or any other documents, as you may reasonably believe to be connected with any contravention of Gold Control Rules, and forthwith report to this office regarding the seizure made, returning this order, with an endorsement certifying what you had done under it immediately upon its execution.

Given under my hand and seal of this office this nineteenth day of August, 1963.

Seal of Office.

(Sd.) KRISHNA DEV,

19th August, 1963.

Assistant Collector of
Customs and Central Excise,
Nagpur."

Having taken possession of the documents, respondent No. 2 retained those documents at Nagpur for about 8 days. Thereafter the documents were sent to Delhi temporarily for proper translation by the Departmental Hindi Officer. While the documents were at Delhi, the 3rd respondent *viz.*, the Collector of Customs, Nagpur, made an order of seizure under section 110 (3) of the Customs Act. The order of seizure, dated 6th September, 1963 states:

"Whereas information has been received that the undermentioned documents are in the custody of Shri S. H. Joshi, Superintendent of Central Excise, Nagpur :

1. Nagpur ki Juni Rokad Bahi Hisab Bahi Shri Nagpur ki 24th July, 1958 to 28th October 1959 (in Hindi), pages 1 to 96 ;
2. Shri Rokad Bahi Nagpur (in Hindi), pages 1 to 27 ;
3. Rokad-Bhuramalji Agarwal (in Hindi), pages 1 to 78 ;
4. Shri Khata Bahi Bhai Bhuramalji Agarwal Samvat 2000-2001, 2005-2006 (in Hindi), page 1 to 53 ;
5. Partners Shri X Du Group Hisab Bahi—upto 3rd May, 1959 (in Hindi), pages 1 to 45 ;
6. Shri Khata Bahi—Bh. Bhuramalji Agarwal—Samvat 2006-7 to 2012 (in Hindi) pages 1 to 57 ;
7. Hisab (bahi)—Partners—G X F Group up to 3rd May, 1959 (in Hindi), pages 1 to 20 ;
8. Om-P. Ankada Bahi (in Hindi), pages 1 to 25 ;
9. Ankada (Bahi) Bombay, Nagpur (in Hindi), pages 1 to 10 ;
10. Shri Jaipur ki Hisab Bahi (in Hindi), pages 1 to 101; (loose papers) and 1 to 39 (regular pages) ;
11. G.N.A. 1956-58 (A/c. Book in English), pages 1 to 101 ;
12. Account Book similar to No. 11 above (in English) back card-board cover missing pages 1 to 129 ;
13. June Shan Jakhiramji Bhagwandasji, pages 1 to 2, loose papers. Pages 1 to 71 regular pages ; 3rd November, 1956 to 2nd May, 1959;—Total thirteen exercise book type account books:

14. Eight bunches of loose sheets stitched together containing sheets as detailed below :

Bunch No. 1 containing sheets 5; Bunch No. 2 containing sheets 6; Bunch No. 3 containing sheets 4; Bunch No. 4 containing sheets 5; Bunch No. 5 containing sheets 4; Bunch No. 6 containing sheets 2; Bunch No. 7 containing sheets 2; Bunch No. 8 containing sheets 3;

15. Loose papers 25 sheets (including small chits) recovered from Shriram Bhawan, Nagpur and whereas I am of the opinion that the said documents are useful for and relevant to the proceedings under Customs Act, 1962 (LII of 1962) I, Shri Tilak Raj, the Collector of Central Excise, having been empowered as Collector of Customs under Notification No. G.S.R. 214, dated 1st February, 1963, of the Government of India in this behalf in exercise of the said powers hereby order that the aforesaid documents shall be seized."

Respondent No. 3 made a second order of seizure dated 11th September, 1963, with regard to the same documents. Respondent No. 3 has explained that he had to make the second order of seizure dated 11th September, 1963, because he was, at first, under the impression that the documents were under the custody of respondent No. 2, but later on he learnt that respondent No. 2 had already made over the documents to the custody of Sri Krishan Dev, Assistant Collector of Central Excise, Nagpur.

It is contended by Mr. Pathak on behalf of the appellants that the order of search and seizure dated 19th August, 1963, was illegal because the Excise Authorities

had no power to seize documents under Rule 126-L (2) of the Defence of India (Amendment) Rules, 1963 which states:

"126-L. *Power of entry search seizure, to obtain information and to take samples* —

(1)

(2) Any person authorised by the Central Government by writing in this behalf may—

(a) enter and search any premises, not being a refinery or establishment referred to in sub-rule

(1), vaults, lockers or any other place whether above or below ground ;

(b) seize any gold in respect of which he suspects that any provision of this Part has been, or is being, or is about to be contravened, along with the package, covering or receptacle, if any, in which such gold is found and thereafter take all measures necessary for their safe custody.

....."

It is contended for the appellants that the Rule only gives authority to seize any gold in respect of which there is suspicion of contravention of the Gold Control Rules along with the package, covering or receptacle, but there is no provision in the Rule for search or seizure of any documents. On behalf of the respondents the Solicitor-General relied upon the provisions of Rule 156 which is to the following effect :

"156. *Powers to give effect to rules, orders etc* (1) Any authority, officer or person who is empowered by or in pursuance of the Defence of India Ordinance, 1962, or any of these Rules to make any order or to exercise any other power may, in addition to any other action prescribed by or under these Rules, take, or cause to be taken, such steps and use, or cause to be used, such force as may, in the opinion of such authority, officer or person be reasonably necessary for securing compliance with, or for preventing or rectifying any contravention of, such order or for the effective exercise of such power

(2) Where in respect of any of the provisions of these Rules there is no authority, officer or person empowered to take action under sub-rule (1), the Central or the State Government may take, or cause to be taken, such steps and use, or cause to be used, such force as may in the opinion of that Government be reasonably necessary for securing compliance with, or preventing or rectifying any breach of, such provision

(3) For the avoidance of doubt, it is hereby declared that the power to take steps under sub-rule (1) or under sub-rule (2) includes the power to enter upon any land or other property whatsoever "

It was submitted that the Superintendent of Customs and Central Excise was an officer empowered by the Central Government to exercise the power under Rule 126-L (2) and under Rule 156 the Superintendent had the additional power to take or cause to be taken such steps as may be reasonably necessary for the effective exercise of such power. The argument was stressed that under Rule 156 the Superintendent had the power to seize documents for the purpose of investigating whether the gold which was seized was gold in respect of which any provision of Part XII-A had been contravened. We do not think there is any justification for this argument. The power granted to the authority empowered under Rule 156 is an ancillary or incidental power for making effective seizure of suspected gold. In other words, the power granted under Rule 156 is the power to take such action as may be necessary for seizing the gold and does not include the power of seizure of documents which is not an ancillary but an independent power. The view that we have taken is borne out by the Seventh Amendment of the Defence of India Rules made on 24th June, 1963. Before the amendment, Rule 126-L reads as follows :

"126-L. *Power of entry, search, seizure, to obtain information and to take samples* —(1) Any person authorised by the Board by writing in this behalf may—

(a) enter and search any refinery of which the refiner, or the establishment of a dealer who is licensed under this Part ;

(b) seize any gold in respect of which he suspects that any provision of this Part has been, or is being, or is about to be, contravened, along with the package, covering or receptacle, if any, in which such gold is found and thereafter take all measures necessary for their safe custody

(2) Any person authorised by the Central Government by writing in this behalf may—

(a) enter and search any premises, not being a refinery or establishment referred to in sub-rule (1), vaults, lockers or any other place whether above or below ground ,

(b) seize any gold in respect of which he suspects that any provision of this Part has been, or is being, or is about to be contravened, along with the package, covering or receptacle, if any, in which such gold is found and thereafter take all measures necessary for their safe custody.

....."

After the Seventh Amendment the following clause was inserted after clause (b) in sub-rule (1) :

"(c) seize any books of account, return or any other document relating to any gold in respect of which he suspects that any provision of this Part has been, or is being, or is about to be, contravened and thereafter take all measures necessary for their safe custody."

By the same amendment the following sub-rule was inserted after sub-rule (2) :

"(3) Any officer authorised by the Board by writing in this behalf may search any person that officer has reason to believe that such person has secreted about his person—

(a) any gold in respect of which such officer suspects that any provision of this Part has been or is being, or is about to be, contravened.

(b) any document relating to such gold."

It is important to notice that Rule 126-L (2) has not been amended by the Seventh Amendment and there is no provision in this sub-rule for such a seizure of any document. We are, therefore, of the opinion that respondent No. 1 had no authority under Rule 126-L (2) of the Defence of India Rules to order respondent No. 2 to seize and take possession of the documents in the premises of the appellant.

The appellants will not however be entitled to the relief of grant of a writ, because we are of the opinion that there is a valid order of seizure of the same documents on 11th September, 1963, by the Collector of Customs under section 110 (3) of the Customs Act. Section 110 of the Customs Act states :

"110. (1) If the proper officer has reason to believe that any goods are liable to confiscation under this Act, he may seize such goods :

Provided that where it is not practicable to seize any such goods, the proper officer may serve on the owner of the goods an order that he shall not remove, part with, or otherwise deal with the goods except with the previous permission of such officer.

(2) Where any goods are seized under sub-section (1) and no notice in respect thereof is given under clause (a) of section 124 within six months of the seizure of the goods, the goods shall be returned to the person from whose possession they were seized :

Provided that the aforesaid period of six months may, on sufficient cause being shown, be extended by the Collector of Customs for a period not exceeding six months.

(3) The proper officer may seize any documents or things which, in his opinion, will be useful for, or relevant to, any proceeding under this Act.

(4) The person from whose custody any documents are seized under sub-section (3) shall be entitled to make copies thereof or take extracts therefrom in the presence of an officer of Customs."

On this aspect of the case it was, firstly, submitted by the appellant that the Collector of Customs was not a "proper officer" within the meaning of the Act and so he had no authority to seize documents from the possession of the Superintendent or the Assistant Collector, Central Excise. Reference was made to section 2 (34) of the Customs Act which states :

"2. (34) 'proper officer', in relation to any functions to be performed under this Act, means the officer of customs who is assigned those functions by the Board or the Collector of Customs ;"

On behalf of the respondents the Solicitor-General relied upon section 5 (2) of the Customs Act which states that "an officer of Customs may exercise the powers and discharge the duties conferred or imposed under this Act on any other officer of customs who is subordinate to him". Mr. Pathak, however, submitted that section 5 (2) has no application to this case because there is a difference between the "functions" on the one hand and "powers and duties" referred to in section 5 (2) of the Customs Act on the other. We do not think it is necessary to go into this point because we are of the view that, in any event, the Collector of Customs would be a "proper officer" in relation to the functions to be performed by the Act, because as a matter of principle the Collector of Customs who had assigned the powers of a "proper officer" to the subordinate officer must himself be deemed to have powers of a "proper officer" under section 110 (3) of the Customs Act. We accordingly reject the contention of Mr. Pathak on this point.

It was next submitted on behalf of the appellant that on both the dates—6th September, 1963 and 11th September, 1963—the documents were not in physical possession of respondent No 2 and there could not be a valid seizure of documents as contemplated by section 110 (3) of the Customs Act. It is the admitted position that when seizure orders were passed by the Collector of Customs on 6th September, 1963 and 11th September, 1963 the documents were not in Nagpur or within the territorial jurisdiction of respondent No 3. But we do not accept the argument of the appellant that the power of seizure must necessarily involve, in every case, the act of physical possession of the person who had a right to seize the articles. It is true that the documents had been sent to Delhi by respondent No 2 for a limited purpose and for a limited period. But though the documents were sent to Delhi, respondent No 2 was still in legal possession of the documents, for he had the right to control the use of the documents and to exclude persons who should or should not have access to the documents. The legal position is that at Delhi the documents were in possession of a bailee for the limited purpose of examination and translation of the documents but the legal possession was still with respondent No 2. The law on this point has been correctly stated by Mellish, L.J. in *Ancona v Rogers*¹ as follows:

there is no doubt that a bailor who has delivered goods to a bailee to keep them on account of the bailor may still treat the goods as being in his own possession and can maintain trespass against a wrongdoer who interferes with them. It was argued, however, that this was a mere legal or constructive possession of the goods and that in the Bills of Sale Act the word 'possession' was used in a popular sense and meant actual or manual possession. We do not agree with this argument. It seems to us that goods which have been delivered to a bailee to keep for the bailor, such as a gentleman's plate delivered to his banker, or his furniture warehoused at the Pantechnicon, would in a popular sense as well as in a legal sense be said to be still in his possession."

This passage was approved by Lord Porter in *United States of America v Dollfus Mug et Compagnie S A and Bank of England*² and it was held in that case that where a bailor can at any moment demand the return of the object bailed, he still has legal possession.

It follows, therefore in this case, that the Collector, by his order of seizure dated 6th September, 1963 or 11th September, 1963 could transfer the legal possession of the documents to himself. The legal effect of the order of seizure made by the Collector was the transfer of the legal possession of the documents from respondent No 2 or respondent No 1 to the Collector. Such a change of possession need not necessarily involve a physical transfer of possession if it was not possible at that stage, but as a matter of law on and from the date of seizure the Collector exercised the full incidents of possession over the documents. The fact that the documents were retained at Delhi for a specific purpose will not affect the legality of the order of seizure and there was, in law, transfer of possession in respect of these documents from respondents Nos 1 and 2 to respondent No 3.

On behalf of the appellants Mr Patbak referred to the decision of this Court in *Gian Chand v The State of Punjab*³. In that case, the question debated was whether the presumption under section 178-A of the Sea Customs Act, 1878 would arise in respect of an article which was originally seized by the police and handed over to the authorities of the Customs Department and was actually with one of them when it was seized. In this context this Court observed at page 373 of the Report

"A 'seizure' under the authority of law does involve a deprivation of possession and not merely of custody and so when the police officer seized the goods the accused lost possession on which vested in the police. When that possession is transferred, by virtue of the provisions contained in section 180 to the Customs authorities there is no fresh seizure under the Sea Customs Act. It would, therefore, follow that, having regard to the circumstances in which the gold came into the possession of the Customs authorities the terms of section 178-A which requires a seizure under the Act were not satisfied and consequently that proof cannot be availed of to throw the burden of proving that the gold was not smuggled on the accused.

¹ (1876) 1 Ex.D 285 at p 292

² (1952) 1 A.E.R. 572

³ (1962) (Supp.) 1 S.C.R. 364 A.I.R. 196 S.C. 496

The ratio of that case is of no assistance to the appellants, for the question at issue in that case was in regard to burden of proof under section 178-A of the Sea Customs Act and whether the presumption under that section would arise in the special circumstances of the case. Mr. Pathak also referred to the decision of the Queen's Bench in *Vinter v. Hind*¹, in which the respondent, a butcher, exposed for sale part of a cow which had died of disease, and sold the meat to a customer, who took it home for food, and some days afterwards was requested by the appellant, an Inspector of nuisances, to hand it over to him, and it was condemned by a justice as unfit for the food of man. It was held by the Queen's Bench in these circumstances that the meat was not "so seized" and condemned as is prescribed by sections 116 and 117, the Public Health Act, 1875, and therefore the respondent was not liable, as the person to whom the same "did belong at the time of the exposure for sale," to a penalty under section 117. The decision of this case is of no help to the appellants because the actual decision turned upon the language of sections 116 and 117 of the Public Health Act, 1875 and the respondent was held not liable to the penalty because he was not the person to whom the meat "did belong at the time of exposure for sale".

It was then contended on behalf of the appellants that there is no material to show that the documents seized were relevant or useful to the proceedings under the Customs Act and in the absence of such material the seizure of the documents must be held to be illegal. We do not think there is any warrant for this argument. The orders of the Collector dated 6th September, 1963, and 11th September, 1963 both state that the Collector was of opinion "that the documents were useful for and relevant to the proceedings under the Customs Act, 1962". Respondent No. 2 has also stated in para. 3 of his return that information was received from a reliable source that the appellant had a considerable quantity of hoarded gold which had not been declared by him under Rule 126-I of the Defence of India (Amendment) Rules, 1963, and for this purpose a raid was made for search of gold and gold ornaments. Respondent No. 2 has further stated as follows:—

"During this search, I also came across certain documents and records which indicated that the petitioner had acquired considerable quantity of gold which was far in excess of the quantity of gold declared by the petitioner and his family members in the declaration submitted by them under Rule 126-I of the Defence of India (Amendment) Rules, 1963. In addition, I also found documents indicating that the petitioner had resorted to dealings constituting breach of the Customs Regulations and the Regulations under the Foreign Exchange Regulation Act punishable under the Sea Customs Act, 1878 and/or the Customs Act, 1962. The documents, note-books and files which I came across also indicated that the petitioner had resorted to under-invoicing of export of mineral ores to the extent of millions of rupees, large-scale purchase of gold to the tune of lakhs of rupees, unauthorised sale of Foreign Exchange involving lakhs of dollars (U.S.) to parties of whom some are persons known to be directly or indirectly involved in smuggling activities."

We accordingly hold that there is sufficient material to support the information of the Collector of Customs under section 110 (3) of the Customs Act that the documents would be useful or relevant to the proceedings under the Act and the argument of Mr. Pathak on this aspect of the case must be rejected.

For the reasons expressed, we hold that the High Court was right in saying that the appellant had made out no case for grant of a writ. This appeal accordingly fails and must be dismissed with costs.

Civil Appeal No. 677 of 1965:

This appeal arises out of Special Civil Application No. 437 of 1963 relating to the search of the premises of the appellant—Durga Prasad at Tumsar and Nagpur on the basis of an authorisation dated 24th September, 1963, issued by the Assistant Collector of Customs, Raipur to the Superintendent of Central Excise at Nagpur under section 105 of the Customs Act which reads as follows:

"Shri H. R. Gomes,
Superintendent (Prev.) H.Qrs.,
Central Excise, Nagpur.

Whereas information has been laid before me of the suspected commission of the offence under section 11 read with section 111 of the Customs Act, 1962 (LII of 1962) and it has been made to appear

that the production of contraband goods and documents relating thereto are essential to the enquiry about to be made in the suspected offence.

This is to authorise and require you to search for the said articles and documents in the shop/office/godowns/residential premises/conveyance/packages belonging to or on the person of Shri Durgaprasad Saraf Tumsar and if found, to produce the same forthwith before the undersigned returning this authority letter with an endorsement certifying what you have done under it immediately upon its execution.

Given under my hand and the seal of this office, this 24th day of September, 1963.

Seal of the Integrated Divisional Office.

Central Excise, Raipur.

(Sd.) R. N. SEN

Assistant Collector,

Customs & Central Excise : I D O.

Raipur : M P.

It is contended on behalf of the appellant that the authorisation is not legally valid since there is no averment by the Assistant Collector that the documents were "secreted". Section 105 of the Customs Act states.

"105 (1) If the Assistant Collector of Customs, or in any area adjoining the land frontier or the coast of India an officer of customs specially empowered by name in this behalf by the Board, has reason to believe that any goods liable to confiscation, or any documents or things which in his opinion will be useful for or relevant to any proceeding under this Act, are secreted in any place, he may authorise any officer of customs to search or may himself search for such goods, documents or things.

(2) The provisions of the Code of Criminal Procedure, 1898, relating to searches shall, so far as may be, apply to searches under this section subject to the modification that sub-section (5) of section 163 of the said Code shall have effect as if for the word "Magistrate", wherever it occurs, the words "Collector of Customs" were substituted."

According to the appellant the power of seizure under section 105 of the Customs Act cannot be exercised unless the Assistant Collector had reason to believe that the documents were secreted. It was argued that the word "secreted" is used in section 105 in the sense of being hidden or concealed and unless the officer had reason to believe that any document was so concealed or hidden, a search could not be made for such a document. We are unable to accept the submission of the appellant as correct. In our opinion, the word 'secreted' must be understood in the context in which the word is used in the section. In that context, it means 'documents which are kept not in the normal or usual place with a view to conceal them' or it may even mean 'documents or things which are likely to be secreted'. In other words, documents or things which a person is likely to keep out of the way or to put in a place where the officer of law cannot find it. It is in this sense that the word 'secreted' must be understood as it is used in section 105 of the Customs Act. In this connection reference was made by the Solicitor-General to the affidavits of the Superintendent of Central Excise dated 28th October, 1963. Para. 6 states that "Some of the documents were recovered from the living apartments and safe of the petitioner and also from the drawers of the tables and cabinets utilised by his sons and a search was made for documents which may have been secreted in the premises".

It was further submitted on behalf of the appellant that the power of search under section 105 of the Customs Act cannot be exercised unless the authorisation specifies a document for which search is to be made. In other words, it is contended that the power of search under section 105 of the Customs Act is not of general character. We do not accept this argument as correct. The object of grant of power under section 105 is not search for a particular document but of documents or things which may be useful or necessary for proceedings either pending or contemplated under the Customs Act. At that stage it is not possible for the officer to predict or even to know in advance what documents could be found in the search and which of them may be useful or necessary for the proceedings. It is only after the search is made and documents found therein are scrutinised that their relevance or utility can be determined. To require, therefore, a specification or description of the documents in advance is to misapprehend the purpose for which the power is granted for effecting a search under section 105 of the Customs Act. We are, therefore, of opinion that the power of search granted under section 105 of the Cus-

toms Act is a power of general search. But it is essential that before this power is exercised, the preliminary conditions required by the section must be strictly satisfied, that is, the officer concerned must have reason to believe that any documents or things, which in his opinion are relevant for any proceedings under the Act, are secreted in the place searched. We have already mentioned the reasons for holding that this condition has been satisfied in the present case.

For the reasons expressed, we hold that the appellant has made out no case for the grant of a writ and this appeal must be dismissed with costs.

Civil Appeals Nos. 679 and 680 of 1965.

The material facts in these two appeals are similar to those in Civil Appeal No. 677 of 1965 and Mr. Pathak did not urge any additional ground in these two appeals. For the reasons already given in Civil Appeal No. 677 of 1965, we hold that these two appeals have no merit and must be dismissed with costs. There will be one hearing fee for all the four appeals.

V.K.

Appeals dismissed.

THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT :—P. B. GAJENDRAGADKAR, *Chief Justice*, K. N. WANCHOO, C. SHAH, S. M. SIKRI AND V. RAMASWAMI, JJ.

The State of Uttar Pradesh

.. *Appellant**

v.

R. B. Agarwal

.. *Respondent.*

Constitution of India (1950), Article 134 (1) (c)—Scope—Order of conviction by trial Court set aside by High Court on appeal—Application by State for a certificate under Article 134 (1) (c)—Competency.

Constitution of India (1950), Article 136—Supreme Court Rules, Order 21, rule 2—Appeal lying to Supreme Court on certificate being issued by High Court—Application for Special Leave under Article 136—Not to be entertained unless certificate is refused.

If an accused person is convicted by the trial Court and on appeal to the High Court his conviction is set aside, the State is entitled to apply to the High Court for a certificate under Article 134 (1) (c). Such an application cannot be rejected *in limine* on the ground that it is incompetent ; it has to be entertained and considered and decided on the merits. The fact that no provision has been made in the Constitution of India which may be said to correspond to section 417 of the Criminal Procedure Code, is of no significance in view of the fact that the words used in Article 134 (1) (c) are wide enough to take in appellate orders of acquittals passed by the High Court while dealing with appeals brought before them by accused persons who are convicted by the trial Courts.

Observations to the contrary in *State Government, M.P. v. Ramakrishna Ganpatrao Limsey and others*, A.I.R. 1954 S.C. 20 and *S. Majumdar v. A. Brahmachari and others*, CrI.App. No. 21 of 1960 decided on 14th September, 1964, disapproved.

Where an appeal lies to the Supreme Court on a certificate issued by the High Court, no application to the Supreme Court for Special Leave to appeal under Article 136 of the Constitution of India shall be entertained unless the High Court has first been moved and it has refused to grant a certificate : (*vide* order 21, rule 2 of Supreme Court Rules).

Appeal by Special Leave from the Judgment and Order dated the 26th August, 1965, of the Allahabad High Court (Lucknow Bench) at Lucknow in S.C. Appeal No. 85 of 1965.

O. P. Rana, Advocate, for Appellant.

R. K. Garg, Advocate of *M/s. Ramamurthi & Co.*, for Respondent.

The Judgment of the Court was delivered by

Gajendragadkar, C J—If an accused person is convicted by the trial Court but on appeal to the High Court is acquitted, can the State move the High Court under Article 134 (1) (c) of the Constitution for a certificate that the case in question is a fit one for appeal to the Supreme Court?—that is the short question which arises in this appeal by Special Leave

The respondent R B Agarwal was committed to the Sessions for trial by the Judicial Officer, Lucknow under sections 467 and 471 of the Indian Penal Code. The learned Assistant Sessions Judge who tried this case, dropped the charge under section 471, but convicted the respondent under section 467, Indian Penal Code, and sentenced him to suffer rigorous imprisonment for five years and to pay a fine of Rs 10 000 and in default to undergo further rigorous imprisonment for a period of two years

The respondent challenged the said order of conviction and sentence by preferring an appeal before the High Court of Judicature at Allahabad, Lucknow Bench. The High Court allowed the respondent's appeal, set aside the order of conviction and sentence imposed on him by the trial Court and directed that he should be acquitted. The appellant, the State of Uttar Pradesh, then applied to the High Court for a certificate under Article 134 (1) (c) of the Constitution. The High Court has rejected the said application on the ground "that in view of the latest pronouncement of the Supreme Court in *S Majumdar v A Brahmachari and others*¹, Article 134 does not provide for an appeal to the Supreme Court from an order of acquittal by the High Court". It is this order refusing to entertain the appellant's application for certificate on the ground that it is incompetent under Article 134 (1) (c), which is challenged before us by the appellant in the present appeal.

Mr Rana for the appellant contends that the words used in Article 134 (1) (c) are plain and unambiguous, and they do not justify the view taken by the High Court that it is not open to the State to move the High Court for a certificate in a case where the High Court has set aside the order of conviction and sentence passed by the trial Court against an accused person. Article 134 (1) (c) provides that an appeal shall lie to the Supreme Court from any judgment, final order or sentence in a criminal proceeding of a High Court in the territory of India if the High Court certifies that the case is a fit one for appeal to the Supreme Court. It will be noticed that in the present appeal we are not concerned with the question as to whether the application made by the appellant for a certificate should be granted or not, that is a part of the merits of the enquiry which the High Court will have to hold in case we come to the conclusion that the High Court was in error in taking the view that the application made by the appellant was incompetent. The stage to consider the merits of the said application can arise only if and after the application is held to be competent.

Now the relevant words in Article 134 (1) (c) are wide in their sweep. They authorise an application for a certificate from any judgment, final order, or sentence in a criminal proceeding of a High Court. It is difficult to see how an order of acquittal passed by the High Court in an appeal preferred before it by a convicted accused person cannot be said to be a judgment, or final order in a criminal proceeding of the High Court. Therefore, on the plain words of Article 134 (1) (c), we see no escape from the conclusion that if an accused person is convicted by the trial Court and on appeal, the High Court sets aside the said order of conviction, it would be competent to the State to apply to the High Court for a certificate under Article 134 (1) (c) of the Constitution.

Article 134 (1) (a) and (b) confer a right of an appeal to this Court, whereas Article 134 (1) (c) confers a right on the aggrieved party to make an application for a certificate, and it is for the High Court to consider whether the certificate of

fitness should be issued or not. Article 134 (1) (c) does not, therefore, give the State a right to move this Court by way of an appeal against the order of acquittal passed by the High Court in appeal. Nevertheless, it has a right to move the High Court for a certificate in that behalf. In our opinion, this position is plain and unambiguous.

It, however, appears that in *The State Government, Madhya Pradesh v. Ramakrishna Ganpatrao Limsey and others*¹, this Court has made certain observations which are likely to create an impression that an application for a certificate would be incompetent in regard to cases where an order of conviction passed by the trial Court has been set aside by the High Court on appeal. The said case had come to this Court under Article 136 by Special Leave, and on the merits this Court came to the conclusion that no case had been made out for interference by this Court with the order passed by the High Court which was under appeal. That shows that the question as to whether an application for a certificate can be made by the State against an order of acquittal by the High Court on appeal, did not fall to be considered at all. Even so, incidentally, this Court has referred to Article 134 and has observed that Article 134 does not provide for an appeal from a judgment, final order, or sentence in a criminal proceeding of a High Court if the High Court has on appeal reversed an order of conviction of an accused person and has ordered his acquittal. In this connection, it has also been observed that there is no provision in the Constitution corresponding to section 417 of the Code of Criminal Procedure and such an order is final, subject however to the over-riding powers vested in this Court by Article 136 of the Constitution. With respect, the fact that no provision has been made in the Constitution which may be said to correspond to section 417, Criminal Procedure Code, is of no significance in view of the fact that the words used in Article 134 (1) (c) are wide enough to take in appellate orders of acquittal passed by the High Courts while dealing with appeals brought before them by accused persons who are convicted by the trial Courts. As we have already indicated, the sweep of the relevant words used in Article 134 (1) (c) being very wide, it is hardly necessary to look for any separate provision in the Constitution which would correspond to section 417, Criminal Procedure Code. Therefore, we do not think that the observations made by this Court in *Limsey's case*¹, can be said to represent correctly the true legal position as to the scope and effect of Article 134 (1) (c) of the Constitution.

In *Shantiranjana Majumdar's case*², this Court was again dealing with an application brought before it under Article 136 by Special Leave, and in considering the merits of the appeal, incidentally, reference has been made to the earlier decision of the Court in *Limsey's case*¹, and it has been observed that according to the said decision there is no provision in the Constitution corresponding to section 417, Criminal Procedure Code and, therefore, the order of acquittal made by the High Court is final, subject however to the over-riding powers of this Court under Article 136 of the Constitution. What we have said about the relevant observations made in *Limsey's case*¹, applies equally to the observations made in *Shantiranjana Majumdar's case*².

In our opinion, therefore, the true legal position is that if an accused person is convicted by the trial Court and on appeal to the High Court, his conviction is set aside, the State is entitled to apply to the High Court for a certificate under Article 134 (1) (c). Such an application cannot be rejected *in limine* on the ground that it is incompetent; it has to be entertained and considered and decided on the merits.

The result is the appeal is allowed, the order of the High Court refusing to grant a certificate on the ground that the application made by the appellant in that behalf is incompetent, is set aside and it is remitted to the High Court for disposal in accordance with law.

1. A.I.R. 1954 S.G. 20.

2. G.A. No. 21 of 1960, decided on 14th Sep-

After we granted Special Leave to the appellant to file an appeal against the unpugned order refusing to entertain the appellant's application for a certificate as a matter of precaution, to save limitation, the appellant has also filed an application for Special Leave to appeal to this Court against the appellate decision of the High Court on the merits. We cannot and do not propose to deal with the said application because Order 21, rule 2, of the Supreme Court Rules provides, *inter alia* that where an appeal lies to the Supreme Court on a certificate issued by the High Court, no application to the Supreme Court for Special Leave to appeal shall be entertained unless the High Court has first been moved and it has refused to grant a certificate. We would therefore, direct that the application for Special Leave filed by the appellant should stand over until the final decision by the High Court on the merits of the appellant's application for certificate which we are remitting to the High Court for decision in accordance with law.

V K

Appeal allowed

THE SUPREME COURT OF INDIA

(Criminal Appellate Jurisdiction)

PRESENT —K SUBBA RAO, M Hidayatullah and R S BACHAWAT, JJ

M V Krishnan Nambissan

*Appellant**

v

The State of Kerala

Respondent

Prevention of Food Adulteration Act (XXXVII of 1954) section 23—Rules framed under Appendix B A 11 03—Butter milk—Standard prescribed—If should contain same amounts of solids not fat as curds

It is not an ingredient of the definition of butter milk that it should contain any particular percentage of solids not fat. Indeed no standard in regard to its contents is prescribed. The only standard if it may be described as one is that it shall be a product obtained in the manner described thereunder. A person commits no offence where he merely added water to the extent of 11 per cent to the butter milk. The reason for the omission to prescribe a standard for butter milk is presumably due to the fact that it is not possible to maintain in butter milk the same percentage of solids not fat content as is found in curds or milk, for water will be added in the process of making butter milk owing to the fat that butter grains in the churn are washed with cold water which run off into the butter milk.

Quare.—Whether prosecution could be launched for adulteration of butter milk under some other clauses of the definition of adulterated in section 2 of Prevention of Food Adulteration Act?

Appeal from the Judgment and Order, dated the 11th October, 1963 of the Kerala High Court in Criminal Appeal No 153 of 1962

R Ganapathy Iyer, Advocate, for Appellant

P Govinda Menon and M R K Pillai, Advocates for Respondent

The Judgment of the Court was delivered by

Subba Rao, J.—The appellant is the manager of the Palghat Depot of Messrs Nambissan's D V Dairy Farm. On 20th July, 1961, one of the Food Inspectors visited his depot and purchased from the second accused, the salesman in charge of the depot, two *nazhis* of 'skimmed thick butter milk' out of the stock exposed for sale in the depot. He sent a sample of it for analysis to the Public Analyst. The Analyst reported that the solids not fat content in the said sample was 7.5 per cent as against 8.5 per cent prescribed for curd, he was of the opinion that the sample contained not less than 11 per cent of added water. When the sample was analysed a few months later by the Central Food Analyst, he reported that the solids not fat content in the sample was only 6.4 per cent. Thereupon a complaint was filed in the Court of the District Magistrate (Judicial), Palghat, against the appellant and his salesman—we are not concerned in this appeal with the charge against the sales

man. The charge against the appellant was that he committed an offence under section 16 (1) (a) (i) and section 7 of the Prevention of Food Adulteration Act, 1954 (XXXVII of 1954), hereinafter called the Act, read with rule 44 of the Prevention of Food Adulteration Rules, 1955, hereinafter called the Rules. The charge against him was that he exposed for sale "skimmed thick butter-milk" which on analysis was found to be adulterated with water to the extent of 11 per cent. The learned District Magistrate, on a consideration of the entire evidence placed before him, came to the conclusion that the appellant was not guilty of the offence with which he was charged; he held that no standard of quality was prescribed for butter-milk and, therefore, the accused could not be convicted for the offence under the Act and the Rules. On appeal, the High Court took the view that the standard for milk had been fixed by the Rules, that the same standard was made applicable to curd and that, as butter-milk was in essence curd from which butter had been extracted, the butter milk should contain the same quantity of solids-not-fat as curd should contain. On this reasoning, the High Court held, that as the sample showed only 6.4 per cent of solids-not-fat content while it should have contained 8.5 per cent. of it, the accused had committed the offence under the said provisions and sentenced him to pay a fine of Rs. 100, in default to suffer simple imprisonment for one month. Hence the present appeal, by certificate.

Mr. R. Ganapathy Iyer, learned Counsel for the appellant, contended that the appellant was prosecuted for not maintaining the standard prescribed for butter-milk and that, as no standard was in fact prescribed for the said product, the High Court went wrong in convicting him.

To appreciate this contention it is necessary to notice the relevant provisions of the Act and the Rules.

Section 2 (i) (1).—An article of food shall be deemed to be adulterated if the quality or purity of the article falls below the prescribed standard or its constituents are present in quantities which are in excess of the prescribed limits of variability.

Section 7.—No person shall himself or by any person on his behalf manufacture for sale or store, sell or distribute—

(i) any adulterated food ;

(ii) any misbranded food ;

* * * * *

(v) any article of food in contravention of any other provision of this Act or of any rule made thereunder.

Section 16.—(1) If any person—

(a) whether by himself or by any person on his behalf imports into India or manufactures for sale, or stores, or distributes, any article of food in contravention of any of the provisions of this Act or of any rule made thereunder.

* * * * *

he shall, in addition to the penalty to which he may be liable under the provisions of section 6, be punishable.....

In exercise of the power conferred under section 23 of the Act, the Central Government made rules defining the standard of quality for, and fixing the limits of variability permissible in respect of, any article of food. Rule 5 reads :

"Standards of quality of the various articles of food specified in Appendix B to these Rules are as defined in that Appendix."

APPENDIX B.

A. 11.01. Milk means the normal clean and fresh secretion obtained by complete milking of the udder of a healthy cow, buffalo, goat or sheep during the period following at least 72 hours after calving or until colostrum free whether such secretion has been processed or not.

A.11.01.01. Cow milk shall contain not less than 3.5 per cent. of milk fat, except in Orissa where it shall be not less than 3 per cent. and in Punjab and PEPSU where it shall be not less than 4.0 per cent. The milk solids other than milk fat shall be not less than 8.5 per cent.

A. 11.01.02. Buffalo milk shall contain not less than 5.0 per cent. of milk fat except in Delhi, Punjab PEPSU, Uttar Pradesh, Bihar, West Bengal, Assam, Bombay and Saurashtra where it shall not be less than 6 per cent. The milk solids other than milk fat shall not be less than 9 per cent.

A 11 01 03 Goat or sheep milk shall contain not less than 30 per cent of milk fat except in Madhya Pradesh, Punjab PEPSU, Bombay, Uttar Pradesh and Travancore-Cochin where it shall be not less than 35 per cent. The milk solid other than milk fat, shall be not less than 9 percent

Where milk other than skimmed milk, is sold or offered for sale without any indication as to whether it is derived from cow, buffalo, goat, or sheep the standard prescribed for buffalo milk shall apply

A 11 02 Skimmed milk, either fresh or reconstituted means milk from which all or most of the milk fat has been removed by mechanical or any other process and includes "separated milk" or "machine skimmed milk". The milk solids other than milk fat shall be not less than 8.5 per cent

A 11 03 Butter milk means the product obtained after removal of butter from curds by churning or otherwise

A 11 05 (a) Table (creamery) butter means the product prepared exclusively from milk, cream or curd of cow or buffalo or a combination thereof with or without the addition of salt and coloured with annatto and shall contain not less than 80 per cent of milk fat and not more than 16 per cent of moisture. No preservative is permissible in table butter. Diacetyl may be added for flavour but shall not exceed 4 parts per million

(b) Deshi (cooking) butter means the product prepared exclusively from milk, cream or curd of cow or buffalo or a combination thereof without the addition of any salt or any colour or any preservative and intended exclusively for use in cooking or for preparation of ghee. It shall contain not more than 20 per cent, of moisture and not less than 76 per cent of milk fat. Where butter is sold or offered for sale without any indication as to whether it is a table butter or deshi butter, the standards of quality prescribed for table butter shall apply

A 11 06 —Dahi or curd—(a) Whole milk dahi or curd means the product obtained from fresh whole milk either of cow or buffalo by souring. It shall not contain any ingredient not found in milk except sucrose and/or gur.

(b) Skimmed milk dahi or curd means the product obtained from skimmed milk either of cow or buffalo by souring. It shall not contain any ingredient not found in milk, except sucrose and/or gur

The standard of purity of dahi or curd shall be the same as prescribed for the milk from which it is derived

Where dahi or curd, other than skimmed milk dahi is sold or offered for sale without any indication as to whether it is derived from cow or buffalo milk the standards prescribed for dahi prepared from buffalo milk shall apply

It will be seen from the said provisions that it is not an ingredient of the definition of butter milk that it should contain any particular percentage of solids not-fat. Indeed, no standard in regard to its contents is prescribed. The only standard, if it may be described as one, is that it shall be a product obtained after removal of butter from curd by churning or otherwise. It is not suggested that the butter milk in question was not a product obtained in the manner described thereunder. *Prima facie*, therefore, it follows that the appellant has not committed any offences with which he was charged, namely, that he had added water to the extent of 11 per cent to the butter milk.

Mr Govmda Menon, learned Counsel for the State, contended that a fair reading of the definition of the various milk products in Appendix B leads to an irresistible conclusion that for butter milk the same standard of solids not fat prescribed for curds would apply. It was said that butter milk was nothing more than curd from which fat had been removed and, therefore, there was no reason why, apart from fact, the other contents should be different from those found in the milk.

It will be seen from the definitions of the various products in Appendix B to the Rules, which we have already extracted, that wherever the rule making authority intended to prescribe a specific standard for the contents of a product, it definitely states so. The standards of solids-not fat are fixed for the milk of cow, buffalo, goat or sheep. Though standards are fixed for the milk products, in defining skimmed milk "deshi (cooking) butter, and "skimmed milk dahi or curd" the standard of quality is prescribed with reference to other products. But when we come to butter-milk, no standard for its contents either specifically or with reference to other items is prescribed. A comparative study of the said items leaves no room for doubt that the rule making authority, for reasons, which, we think, are obvious, has not thought fit or feasible to prescribe any such standard in regard to the contents of butter-milk. We cannot by inference read some thing in the definition of butter-

milk which is not there. The reason for this omission is presumably due to the fact that it is not possible to maintain in butter-milk the same percentage of solids-non-fat content as is found in curds or milk, for water will be added in the process of making butter-milk owing to the fact that butter grains in the churn are washed with cold water which will run off into the butter-milk. Anyhow, we would prefer to rest our judgment on the absence of fixation of any standard in respect of butter milk rather than on the process of conversion of curds into butter-milk. We should not be understood to have expressed any view on the question whether a prosecution could be launched for adulteration of butter-milk under some other clauses of the definition of "adulterated" in section 2 of the Act, for in the present case the prosecution was only for not maintaining the standard.

In the result, the order of the High Court is set aside and that of the District Magistrate is restored. The fine if it had already been collected shall be refunded.

K.S.

Appeal allowed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—P. B. GAJENDRAGADKAR, *Chief Justice*, K. N. WANCHOO, M. HIDAYATULLAH, V. RAMASWAMI AND P. SATYANARAYANA RAJU, JJ.

Edwingson Bareh

.. *Appellant**

v.

The State of Assam and others

.. *Respondents.*

Constitution of India (1950), Article 244 (2) and Schedule VI, Table A. Paragraph 1 (3), clauses (c) to (g), 14, 20 and 21—Administration of Tribal Areas in Assam—Bifurcation and creation of an Autonomous district—Powers of the Governor—Legislation by Parliament, not necessary—Mandatory provisions of para 14—Compliance essential—Appointment of a commission and report—Recommendations of the Governor.

The Governor of Assam, by a Notification, created a new Autonomous District to be called the Jowai District by excluding the Jowai Sub-division of the United Khasi-Jaintia Hills District with effect from 1st December, 1964, and fixing the boundaries of the Jowai District. The notification was impugned on the grounds, that paragraph 1 (3) of VI Schedule of the Constitution does not confer on the Governor the power to constitute a new Autonomous district and for that legislation in Parliament is necessary, and alternatively if the Governor is so empowered, the mandatory provisions of paragraph 14 have not been complied with. Article 244 (2) of the Constitution provided that the provisions of VI Schedule shall apply to the administration of the tribal areas in the State of Assam, Para. 1 of VI Schedule defined the powers of Governor, para. 14 dealt with the appointment of a Commission, para. 20 gave a comprehensive description of the tribal areas falling within the State of Assam, and para. 21 dealt with the powers of Parliament.

Held by Majority (Hidayatullah J., contra). The Notification was valid and made in compliance with the provisions of para. 14 of the Sixth Schedule.

If Parliament wants to make any changes in any provisions of VI Schedule, it is entitled to do so. But when paragraph 1 (3) provides that the Governor, by public notification, create a new autonomous district, it does not contemplate that for creation of such an autonomous district, the Constitution requires something more to be done by Parliament itself in order to make the public notification issued by the Governor effective. Paragraph 1 (3) clearly indicates that the Constitution had delegated to the Governor a part of the power conferred on Parliament itself by paragraph 21.

Where the Governor makes changes by virtue of the powers conferred on him by para. 1 (3) (c) to (g), what follows is a change in the internal composition of the different items in Part A of the table. The exercise of the power does not change, and in the present case, has not changed, the total area comprised in Part A and such a change in para. 20 (2) is a logical corollary of the exercise of the power.

The mandatory requirements of para 14, before exercising the powers conferred by clauses (c) to (f) of para 1 (3) are the Governor must appoint a Commission to examine and report on any matter covered by the clauses the Governor should consider the report made by the Commission and make his recommendations with respect thereto the Commission's report along with the Governor's recommendations has to be placed before the Legislature of the State and this has to be accompanied by an explanatory memorandum regarding the action proposed to be taken by the Government

Paragraph 14 (2) requires that before the matter goes to the Legislature, the Governor must apply his mind to it and make his recommendations on it. It would be unreasonable to suggest that in considering the report, the Governor is precluded from receiving the assistance of the Council of Ministers in deciding the same. On the other hand if the Governor in the context, is expected to act as a Constitutional Governor, it would be appropriate the matter should first be examined by the Council of Ministers and then submitted to him for his own recommendations.

On the facts,

The record clearly shows that the Commission recommended that a new Autonomous District should be created. The Governor agreed with the said recommendations and so did the Council of Ministers. The criticism that the Governor has not made any recommendations as such, but has merely contended himself with making a short note 'seen thanks' has no substance.

Appeal from the Judgment and Order, dated the 5th February, 1965, of the Assam and Nagaland High Court in Civil Rule No 286 of 1964.

M C Setahad, Senior Advocate, (*D N Mukerjee*, Advocate, with him), for Appellant

C K Daphtary, Attorney General for India, (*Mauntial*, Advocate, with him), for Respondents

The following Judgments were delivered

Gajendragadkar, C J—The appellant, Edwingson Barchi, belongs to the village of Barato in Jowai area of the United Khasi Jaintia Hills District in Assam. He is an elector from the said area to the District Council of the said United Khasi Jaintia Hills District. In fact, he was elected as a member to the said District Council from Nongjngi Constituency (No 23). This constituency fell within the Jowai area of the said District. Later, the appellant was elected as Chief Executive Member of the District Council in March, 1963. By virtue of his office, he draws a monthly salary and other allowances under the provisions of the United Khasi Jaintia Hills District Council Chairman's, Deputy Chairman's and Executive Member's Salaries and Allowances Act, 1953. He is entitled to hold the said office till a new District Council is elected and takes over.

On the 26th January, 1950, when the Constitution came into force, the United Khasi Jaintia Hills District was formed as one of the Tribal Areas of Assam, and in this area were merged the Khasi States with the other areas of the Khasi Jaintia Hills. The boundaries of this area are defined by paragraph 20 (2) of the Sixth Schedule to the Constitution. All the Tribal Areas mentioned in Part A and Part B of the Table appended to paragraph 20 of the Sixth Schedule are governed by the provisions prescribed by the sixth Schedule.

Under paragraph 2 (4) of the said Schedule, the administration of the United Khasi Jaintia Hills District vested in the District Council which was inaugurated on the 27th June, 1952. This Council consists of 24 different Constituencies out of which 6 are in the Jaintia Hills area. The District Council has been clothed with administrative, legislative and judicial powers over the territory of the District by the relevant provisions of the Sixth Schedule. By the notification issued on the 1st of June, 1964, No Tad/R/8/62, the term of the present District Council was extended up to the 2nd January, 1965, or until the newly elected District Council takes over. By a subsequent notification issued in December, 1964, No TAD/R/8/62, the period of the said Council was further extended from 3rd January, 1965, to the 2nd May, 1965. Under the present administrative set up, the Executive Committee of the District Council consists of three members including the Chief Executive Member.

and two other members, and all the executive functions of the said Council are vested in the Executive Committee.

Purporting to act on certain representations received by him, the Governor of Assam appointed a Commission under paragraph 14 (1) of the Sixth Schedule on the 26th August, 1963. This Commission was required "to examine and report in the matter of (1) creation of a new autonomous District for the people of Jowai Sub-Division of the United Khasi-Jaintia Hills Autonomous District, and (2) exclusion of the area from the United Khasi-Jaintia Hills Autonomous District." The Commission made its report on the 20th January, 1964, and recommended "the creation of a new autonomous District Council for the Jowai Sub-Division of the United Khasi-Jaintia Hills Autonomous District by excluding the areas comprising the area of the said Sub-Division from the United Khasi-Jaintia Hills Autonomous District."

Thereafter, the Minister in charge of the Tribal Areas and Welfare of Backward Classes Department of the Government of Assam laid before the Assam Legislative Assembly during its autumn session of 1964 the report of the Commission with an explanatory memorandum made on the 25th September, 1964. This memorandum stated that the Government had decided to accept the recommendation of the Governor on the said report and give effect to it.

After the report was thus placed before the Legislative Assembly, the Assembly passed a resolution approving of the action proposed to be taken by the Government of Assam on the report in question. On the 23rd November, 1964, a notification No. T.A.D./R./50/64 (hereinafter referred to as "the Notification") was issued by the Governor of Assam in accordance with the memorandum which had been placed before the Legislative Assembly of Assam. By this Notification, the Governor of Assam was pleased "to create a new Autonomous District to be called the Jowai District by excluding the Jowai Sub-Division of the United Khasi-Jaintia Hills District with effect from 1st December, 1964; and that the boundaries of the Jowai District shall be the boundaries of the Jowai Sub-Division of the United Khasi-Jaintia Hills District."

The appellant challenged the constitutional validity of this Notification by filing a writ petition before the High Court of Assam and Nagaland on the 30th November, 1964. In his writ petition, the appellant alleged that the Notification was invalid and *ultra vires* the powers of the Governor. Alternatively, it was urged that in exercising his powers, the Governor has contravened the mandatory requirements prescribed by paragraph 14 of the Sixth Schedule to the Constitution. The appellant's case was that even if it was assumed that the Governor had the power to issue the impugned notification, inasmuch as the mandatory provisions of paragraph 14 had not been complied with, the Notification was invalid. To this petition, the appellant impleaded five respondents; the first amongst them was the State of Assam; the others were: the Minister in charge of Tribal Areas and Welfare of Backward Classes Department; the Secretary to the Government of Assam, T. A., O. B. & W. B. C. Department; the Chief Secretary to the Government of Assam; and the Deputy Secretary to the Government of Assam, Tribal Areas and Backward Classes Department, respectively.

The respondents disputed the validity of the contentions raised by the appellant in his writ petition. They urged that the notification had been issued by the Governor in exercise of the powers conferred on him by paragraph 1 (3) of the Sixth Schedule and that all the relevant requirements of paragraph 14 had been complied with. The respondent did not accept the correctness of the appellants' argument that in issuing the Notification, the Governor had acted outside his authority.

Since the point raised by the petition was of considerable importance, and related to the construction of the relevant provisions contained in the Sixth Schedule, the writ petition was placed for hearing before a special Bench of the Assam High Court consisting of three learned Judges. After the writ petition was argued, the High Court,

by a majority decision has rejected the contentions raised by the appellant and has dismissed the writ petition filed by him. The minority judgment has upheld the arguments of the appellant and has held that the impugned Notification is invalid. After the decision of the High Court was pronounced, the appellant applied for and obtained a certificate under Article 132 of the Constitution, and it is with the said certificate that he has come to this Court in the present appeal.

On behalf of the appellant, Mr Setalvad argues that paragraph 1 (3) of the Sixth Schedule does not confer on the Governor the power to constitute a new autonomous district. For the valid creation of a new autonomous district, parliamentary legislation is necessary. In support of this plea, Mr Setalvad has relied on what he describes as 'legislative practice' in that behalf. He further contends that even if the Governor had the power to create a new autonomous district under paragraph 1 (3) the exercise of that power can be effective only after Parliament passes a law in accordance with the decision of the Governor. In other words, the argument is that the Governor may by virtue of his power, decide to create a new autonomous district under paragraph 1 (3) but the decision of the Governor must be confirmed by parliamentary legislation before it becomes effective. In the alternative, Mr Setalvad contends that even if the Governor can effectively create a new autonomous district by virtue of his powers under paragraph 1 (3) he can do so only after complying with the mandatory provisions of paragraph 14, and since these provisions have not been complied with the impugned notification is invalid.

Before dealing with these points, it would be convenient to refer broadly to the scheme of the Sixth Schedule which contains the provisions in relation to the administration of tribal areas in Assam. Article 244 (2) provides that the provisions of the Sixth Schedule shall apply to the administration of the tribal areas in the State of Assam, and that means that tribal areas in Assam would be governed not by the other relevant provisions of the Constitution which apply to the other constituent States of the Union of India, but by the provisions contained in the Sixth Schedule. These provisions purport to provide for a self contained code for the governance of the tribal areas forming part of Assam and they deal with all the relevant topics in that behalf. The areas described in the Table appended to paragraph 20 of the Sixth Schedule, consisting of Part A and Part B constitute the tribal areas within the State of Assam, sub-paragraph (1) of the said paragraph so provides. Sub-paragraphs (2) (2 A) (2 B) and (3) of paragraph 20 describe the boundaries of the items mentioned in the Table. Part A of the Table originally consisted of six items, the first amongst them was the United Khasi Jaintia Hills District. The item of 'The Naga Hills District' which was originally included in Part A has been subsequently taken out of Part A and has been added to Part B. Part B which originally consisted of only one item now consists of two items, the first item is North East Frontier Tract including other Tracts therein described; and the second is the 'Naga Hills-Tuensang Area'. Thus paragraph 20 read with the Table gives a comprehensive description of the tribal areas falling within the State of Assam for whose administration provision is made by the other paragraphs of the Sixth Schedule.

Paragraph 1 of the Sixth Schedule deals with autonomous districts and autonomous regions and confers certain specified powers on the Governor. It is necessary to read this paragraph —

"1 (1) Subject to the provisions of this paragraph the tribal areas in each item of Part A of the table appended to paragraph 20 of this Schedule shall be an autonomous district

(2) If there are different Scheduled Tribes in an autonomous district the Governor may, by public notification divide the area or areas inhabited by them into autonomous regions

(3) The Governor may by public notification —

- (a) include any area in Part A of the said table
- (b) exclude any area from Part A of the said table
- (c) create a new autonomous district
- (d) increase the area of any autonomous district
- (e) diminish the area of any autonomous district

(f) unite two or more autonomous districts or parts thereof so as to form one autonomous district,

(g) define the boundaries of any autonomous district :

Provided that no order shall be made by the Governor under clauses (c), (d), (e) and (f) of this sub-paragraph except after consideration of the report of a Commission appointed under sub-paragraph (1) of paragraph 14 of this Schedule."

Then follow several paragraphs dealing with the constitution of District Councils and Regional Councils ; their powers to make laws ; the administration of justice in autonomous districts and autonomous regions conferment of powers under the Code of Civil Procedure 1908, and the Code of Criminal Procedure, 1898, on the Regional and District Councils and on certain Courts and officers for the trial of certain suits, cases and offences ; these are covered by paragraphs 2, 3, 4 and 5 respectively. Paragraph 6 deals with the powers of the District Council to establish Primary Schools, etc. Paragraph 7 deals with the District and Regional Funds ; paragraph 8 refers to powers to assess and collect land revenue and to impose taxes. Para. 9 has relation to licences or leases for the purpose of prospecting for, or extraction of, minerals. Para. 10 confers on the District Council power to make regulations for the control of money-lending and trading by non-tribals. Paragraphs 11 and 12 deal with the publication of laws, rules and regulations made under the Schedule ; and the application of Acts of Parliament and of the Legislature of the State to autonomous districts and autonomous regions respectively. Paragraph 13 is concerned with the question of estimated receipts and expenditure pertaining to autonomous districts which have to be shown separately in the annual financial statement. Paragraph 14 is concerned with the appointment of a Commission and for the purpose of the present appeal, it is necessary to read it :—

"(1) The Governor may at any time appoint a Commission to examine and report on any matter specified by him relating to the administration of the autonomous districts and autonomous regions in the State, including matters specified in clauses (c), (d), (e) and (f) of sub-paragraph (3) of paragraph 1 of this Schedule or may appoint a Commission to inquire into and report from time to time on the administration of autonomous districts and autonomous regions in the State generally and in particular on—

(a) the provision of educational and Medical facilities and communications in such districts and regions ;

(b) the need for any new or special legislation in respect of such districts and regions ; and

(c) the administration of the laws, rules and regulations made by the District and Regional Councils ;

and define the procedure to be followed by such Commission.

(2) The report of every such Commission with the recommendations of the Governor with respect thereto shall be laid before the Legislature of the State by the Minister concerned together with an explanatory memorandum regarding the action proposed to be taken thereon by the Government of Assam.

(3) In allocating the business of the Government of the State among his Ministers the Governor may place one of his Ministers specially in charge of the welfare of the autonomous districts and autonomous regions in the State."

Paragraph 15 deals with the annulment or suspension of Acts and Resolutions of District and Regional Councils. Paragraph 16 deals with the dissolution of a District or a Regional Council ; paragraph 17 is concerned with the exclusion of areas from autonomous districts in forming constituencies in such districts. Paragraph 18 is concerned with the application of the provisions of this Schedule to areas specified in Part B of the table appended to paragraph 20 ; while paragraph 19 deals with the transitional provisions. Paragraph 21 which is the last paragraph in the Sixth Schedule, is relevant for our purpose ; it reads thus :—

"(1) Parliament may from time to time by law amend by way of addition, variation or repeal any of the provisions of this Schedule and, when the Schedule is so amended, any reference to this Schedule in this Constitution shall be construed as a reference to such Schedule as so amended.

(2) No such law as is mentioned in sub-paragraph (1) of this paragraph shall be deemed to be an amendment of this Constitution for the purposes of Article 368."

That, broadly stated, is the scheme of the provisions contained in the Sixth Schedule.

It is plain that under paragraph 21, Parliament can make a law amending by way of addition, variation or repeal any of the provisions of the Sixth Schedule and when such an amendment is made, reference to the Sixth Schedule in the Constitution shall naturally be construed as a reference to such Schedule as so amended. In other words Parliament is clothed with legislative competence of the widest amplitude in relation to any changes it likes to make in any of the provisions contained in the Sixth Schedule. Paragraph 21 (2) has provided that any changes sought to be introduced by parliamentary legislation under the power conferred on Parliament by sub-paragraph (1) thereof shall not be deemed to amount to an amendment of the Constitution for the purposes of Art 368. There can thus be no doubt that if Parliament wants to make any changes in any provisions of the Sixth Schedule, it is entitled to do so, and that obviously means that the change which has been introduced by the impugned Notification might as well have been made by Parliament. The question which calls for our decision is can the same change be validly introduced by the Governor in exercise of the powers conferred on him by paragraph 1 (3) or not?

We have already noticed that the effect of paragraph 20 read with the table appended to it is that the areas specified in Part A and Part B of the said table amount to tribal areas within the State of Assam. Now, paragraph 1 (1) of the Sixth Schedule provides that the tribal areas in each item of Part A of the table appended to paragraph 20 shall be an autonomous district, subject to the provisions of paragraph 1. This provision is clear in two respects. It does not cover the areas specified in Part B of the table, its application is confined to the areas in each item of Part A of the table alone. It is also clear that the tribal areas in each item of Part A aforesaid shall be an autonomous district, but that would be so subject to the provisions of paragraph 1. In other words, if any changes are made by the Governor in exercise of the powers conferred on him by paragraph 1 (3), those changes will have to be read into the relevant item in Part A of the table, and paragraph 20 will have to be considered in the light of the changes thus introduced in the said item. What is the extent of the power conferred on the Governor by paragraph 1 (3) and how it can be exercised, are matters to which we will turn presently, but confining ourselves to the provisions of para 1 (1), it seems clear that the exercise of the powers prescribed by para 1 (3) has an impact on the description of the items in Part A of the table appended to para 20, and that impact is that the changes made in the description of the items will be introduced in Part A and thereby the scope and effect of para 20 will in consequence, be suitably modified.

Paragraph 1 (3) confers on the Governor power to issue notification for the purpose of bringing about any of the results enumerated seriatim by clauses (a) to (g). In the present case, we are not called upon to consider what clauses (a) and (b) really denote. The notification with which we are concerned is referable to clauses (c), (e) and (g). Clause (c) refers to the power to create a new autonomous district, and this power has been exercised by the Governor in creating a new autonomous district to be called the Jowai District. Clause (e) refers to the power to diminish the area of any autonomous district, and this power has been exercised by the Governor by diminishing the area of the pre-existing United Khasi Jaintia Hills District. Clause (g) refers to the power to define the boundaries of any autonomous district, and this power has, in substance, been exercised by the Governor inasmuch as after the creation of the new Jowai District, the boundaries of the pre-existing United Khasi Jaintia Hills District, as well as the boundaries of the newly created District are automatically defined. Similar power can be exercised under clauses (d) and (f).

The proviso to 1 (3), imposes a condition on the exercise of the power prescribed by clauses (c) (d) (e) and (f) of para 1 (3). It requires that before the Governor exercises his power under any of the said four clauses, he was to appoint a Commission under para 14 (1) and consider its report. The reason why the condition prescribed by the proviso is not made applicable to cases falling under clause (g) can be

easily understood ; the power conferred by the said clause appears, in the context, to be merely consequential on the powers prescribed by the previous four clauses. It is, however, not quite clear why the exercise of the power conferred by clauses (a) and (b) has not been made subject to the condition prescribed by the proviso; but, as we have already indicated, we are really not called upon to consider that aspect of the matter.

Now, reading para. 1 (3) by itself, it seems difficult to appreciate Mr. Setalvad's argument that though the Governor may have the power to create a new autonomous district, the notification that he may issue in exercise of the said power, will not take effect unless Parliament by law provides for the creation of the said new district. It is true that the said power has to be exercised subject to the condition prescribed by the proviso to para. 1 (3). But if the said condition is satisfied, and the requirements prescribed by para. 14 are complied with, is there anything in the provisions of para. 1 as well as para. 14 which would justify the argument that the exercise of the relevant powers is not intended to be effective unless it receives the approval of parliamentary legislation? In our opinion, this question cannot be answered in favour of the appellant. When clause (c) of paragraph 1 (3) provides that the Governor may, by public notification, create a new autonomous district, it does not seem to contemplate that for the creation of a new autonomous district, the Constitution requires something more to be done by Parliament itself in order to make the public notification issued by the Governor effective. In our view, paragraph 1 (3) clearly indicates that the Constitution has delegated to the Governor a part of the power conferred on Parliament itself by paragraph 21. Paragraph 21 shows that Parliament has undoubtedly the power to make any change in any of the provisions contained in the Sixth Schedule. A part of this wide power has, however, been conferred on the Governor, because the Constitution-makers apparently thought that Parliament need not be called upon to exercise its own power for bringing about comparatively smaller and minor changes in Part A of the Table, and it accordingly decided to confer the appropriate power on the Governor to take action in that behalf. If the Governor has been clothed with the relevant power, the exercise of the power must, by itself, be effective to bring about the results intended by clauses (c), (d) (e) and (f) of para. 1 (3). This power must, no doubt, be exercised subject to the conditions prescribed by the proviso to para. 1 (3). But once it is properly exercised as required by the relevant provisions of the Sixth Schedule, it becomes effective and there is no need for parliamentary legislation in that behalf.

In support of his contention that Parliament has legislated in respect of matters falling under para. 1 (3), Mr. Setalvad has referred us to two Parliamentary Statutes. The first one is Act No. XVIII of 1954. This Act was passed by Parliament on the 29th April, 1954 to change the name of the Lushai Hills District. Section 2 of this Act provides that the tribal area in Assam now known as the Lushai Hills District shall, as from the commencement of this Act, be known as the Mizo Districts. Section 3 made a corresponding change in paragraph 20 of the Sixth Schedule and in Part A of the table appended thereto. It is doubtful if the power exercised by Parliament in re-naming a District by passing Act XVIII of 1954 is covered by any of the clauses of para. 1 (3); but, even if it was the exercise of the said power by Parliament cannot show that the same power, if delegated to the Governor, cannot be exercised by him without the assistance of parliamentary legislation in that behalf. This Act, therefore, is not at all decisive on the point raised by Mr. Setalvad.

The other Act on which Mr. Setalvad relies is Act No. XLII of 1957. This Act was passed by Parliament on the 29th November, 1957. Section 3 of this Act omitted item 4—'Naga Hills District' from Part A of the table appended to para. 20 of the Sixth Schedule ; and substituted "The Naga Hills-Tuensang Area" as item 2 in Part B of the said table ; and made the necessary change in para. 20. What we have said about Act No. XVIII of 1954 is equally true about this Act also. It is doubtful whether excluding an item from Part A including it in Part B would fall within any of the clauses prescribed by para. 1 (3) ; but even if it is so, the fact that

Parliament exercises its legislative power in regard to an item delegated to the Governor, will not show that the Governor does not possess that power. Therefore, Mr Setalvad's argument based upon what he calls "legislative practice" does not really assist him.

Incidentally, Mr Setalvad suggested that it would be anomalous to hold that the power conferred on the Governor by para 1 (3) of the Sixth Schedule can be effectively exercised by him without confirmation by parliamentary legislation. He illustrates this point by taking a case where the Governor decides to exercise his powers under para 1 (3) and issues a public notification accordingly. If Parliament does not approve of the said decision, it may make a law reversing the decision in question, and the Governor may adhere to his earlier decision and issue another public notification. Such a course of events, says Mr Setalvad, would lead to a very anomalous situation, and the anomaly can be avoided by holding that the exercise of the Governor's power under para 1 (3) has to be confirmed by parliamentary legislation under para 21 before it becomes effective. We are not impressed by this argument. As we have already observed, the power of Parliament under paragraph 21 is very wide, it includes the power to modify or take away the power conferred on the Governor by para 1 (3), and in the very unlikely event of the Governor attempting to challenge the decision of Parliament, Parliament can take away his power altogether by suitable legislation. We have no doubt that the argument based on a possible anomaly overlooks the fact that such an anomaly can inherently be said to exist wherever the same power is vested in two alternative authorities. That being so, the argument of possible anomalies does not assist Mr Setalvad's contention that parliamentary legislation is necessary before the Governor's decision becomes effective.

Before we part with this topic, it is necessary to refer to another aspect of the problem which has relation to paragraph 20 of the Sixth Schedule. We have already observed that the exercise of the powers prescribed by paragraph 1 (3) has an impact on the description of the items in Part A of the Table appended to para 20, and we have also indicated that the said impact is that the changes made in the description of the items, will be introduced in Part A and thereby the scope and effect of para 20 will, in consequence, be suitably modified. It is now necessary to consider the nature of the modifications which may be made in paragraph 20 and their impact on the question as to whether parliamentary legislation is necessary to make the impugned notification effective.

Paragraph 20 (1) provides that the areas specified in Parts A and B of the table shall be the tribal areas within the State of Assam. The impugned notification has made a change in the composition of the United Khasi Jaintia Hills District by carving out of the said item in Part A of the table two separate items, viz, the United Khasi Jaintia Hills District and the Jowai District. It is however clear that this change does not make any addition to or subtraction from, the total area covered by Part A of the table, and in that sense, the modification made by the Governor by the impugned notification does not affect in any manner the contents of para 20 (1). Even after the said notification has come into force, para 20 (1) truly and correctly provides that the areas specified in Parts A and B of the table shall be the tribal areas within the State of Assam.

It cannot, however, be disputed that as a result of the modification made by the impugned notification, paragraph 20 (2) has to be changed. Paragraph 20 (2), as it originally stood, described in detail the territories comprised in the United Khasi Jaintia Hills District, and as a result of the impugned notification the said description will have to be modified, because the said District has now been split up into two Autonomous Districts. That, however, is a change consequent upon the change made by the Governor by issuing the impugned notification in exercise of the powers conferred on him by para 1 (3). In our opinion where the Governor makes changes by virtue of the powers conferred on him by para 1 (3) (c), (d), (e) (f) and (g), what follows is a change in the internal composition of the different items in Part A of the table. The exercise of the said powers does not change, and in the

present case it has not changed, the total area comprised in Part A. What it purports to do is to change one item into two items of Autonomous Districts. Since the power to bring about this change is expressly conferred on the Governor by paragraph 1 (3) (c), (d), (e), (f) and (g), it is not unreasonable to hold that the exercise of the said power should, as in the present case, lead to a consequential change in para. 20 (2). Such a change in para. 20 (2) is a logical corollary of the exercise of the power conferred on the Governor by para. 1 (3) (c), (d), (e), (f) and (g).

It is possible that by the exercise of the powers conferred on the Governor by paragraph 1 (3) (a) and (b), the area included in Part A of the table may conceivably be either increased or diminished, because the powers conferred on the Governor by para. 1 (3) (a) and (b), *prima facie*, refer to the inclusion of any area in Part A, or exclusion of any area from Part A of the table. We have not thought it necessary to consider or decide what is the nature of the power prescribed by para. 1 (3) (a) or (b). If the power prescribed by para. 1 (3) (a) or (b) is construed in a narrow way in the light of the context of para. 1 (3), and is confined to making changes either by inclusion or exclusion in regard to areas already included in Part A, the total area of Part A may not be altered even by the exercise of such power.

But assuming that the exercise of the said power would enable the Governor to add to the area included in Part A of the table, or to diminish the area included in the said Part by excluding it from the said Part, a question may arise as to the effect of such modification. In such a case, paragraph 20 (1) itself may be affected, and if that happens, it would become necessary to enquire whether the exercise of the Governor's power prescribed by para. 1 (3) (a) or (b) can, without parliamentary legislation, validly make a change in para. 20 (1). In dealing with this question, different considerations would arise. If an addition is made to the area covered by Part A of the table by including in it some outside area, or if a portion of the area included in the said Part is taken out, it would alter the content and complexion of the table considered as a whole, and the question about the necessity of parliamentary legislation to make such a change effective may assume a different aspect. Including any area in Part A, or excluding any area from Part A in the wide sense of the terms used in the said two clauses may, *prima facie* import considerations of general policy which, it may be urged, can be effectively dealt with only by parliamentary legislation; such considerations do not apply where the exercise of the powers conferred on the Governor by para. 1 (3) (c), (d), (e), (f) and (g) means nothing more than permutation and combination of the areas already included in Part A, and that is purely a matter of internal administration. We are, however, not concerned with the aspect of the problem relating to para. 1 (3) (a) and (b) in the present case, and need not, therefore, pronounce any opinion on it.

What has happened in this case is that one Autonomous District has been split up into two separate Autonomous Districts without making any change in the totality of the area included in Part A of the table; and that does not bring about any change in para. 20 (1). Paragraph 20 (2), however, stands on a different footing; it just gives a description of the area included in the United Khasi-Jaintia Hills District and the change made in the said description by the impugned Notification is of such a purely consequential character in relation to the internal adjustment of the areas mentioned in Part A of the table that we do not think parliamentary legislation is required to make such a change effective. Therefore, we are satisfied that it would not be reasonable to hold that without parliamentary legislation the impugned Notification cannot validly effect any change in item 1 of Part A of the table appended to paragraph 20.

In this connection, we may incidentally refer to the provisions of paragraph 18 which deals with the problem of the application of the provisions of the Sixth Schedule to areas specified in Part B of the table appended to para. 20. Para. 18 (1) (b) provides that the Governor may, with the previous approval of the President, by public notification, exclude from the said table any tribal area specified in Part B of that table or any part of such area. This shows that where any area from Part B of the table

has to be excluded from it it can be done by the Governor with the previous approval of the President. Action taken by the Governor in exercise of this power may conceivably fall under paragraph 1 (3) (a), and in that sense, the inclusion of the area in Part A of the table would, in substance, be the result of the decision of the President. It is significant that paragraph 18 (3) specifically provides that in the discharge of his functions under sub paragraph (2) of this paragraph as the agent of the President the Governor shall act in his discretion. Thus it is clear that paragraph 18 deals with the areas in Part B of the table independently, and in respect of them the Governor functions as the agent of the President when he exercises his power under sub paragraph (2) of the said paragraph.

That takes us to the question as to whether Mr Setalvad is right in contending that the Notification is invalid because before issuing it the mandatory requirements of paragraph 14 have not been complied with. What then are the requirements of para 14? The first requirement is that before taking any action in exercise of the powers conferred on him by clauses (c) (d) (e) and (f) of para 1 (3) the Governor must appoint a Commission to examine and report on any matter covered by the said clauses. The second requirement is that the Governor should consider the report made by the Commission and make his recommendations with respect thereto. The third requirement is that the Commissioner's report along with the Governor's recommendations has to be placed before the Legislature of the State by the Minister concerned and this has to be accompanied by an explanatory memorandum regarding the action proposed to be taken thereon by the Government of Assam. There is no doubt that in the present case, the Governor of Assam did appoint a Commission. We have already indicated the terms of reference under which the Commission was appointed. There is also no doubt that the Commission made its report, and it recommended the creation of a new Autonomous District Council for the Jowai Sub Division of the United Khasi Jaintia Hills Autonomous District by excluding the areas comprising the areas of the said Sub Division from the United Khasi Jaintia Hills Autonomous District.

Mr Setalvad contends that this report did not in fact recommend the creation of a new Autonomous District at all, and in support of this argument, he relies on the fact that the recommendation, in terms, refers to the creation of a new Autonomous District Council. He also points out that the Commission has observed that 'if the inhabitants of the Jaintia Hills work together and maintain the existing system of administration there is no reason why a separate District Council for Jowai should not be a success'. The Commission also added that the establishment of a separate District Council would resolve the prevailing tension and bitterness, due to a lack of uniformity in administration between them and the Khasis and the Commission hoped that the creation of a separate District Council would lead to a better understanding between them. It is true that the reference to the creation of a new District Council is somewhat inappropriate in the context, but on considering the Commission's recommendations as a whole there is no doubt that what the Commission recommended was the creation of a new Autonomous District. It would be noticed that the Commission has expressly recommended that the areas comprising the areas of the Jowai Sub-Division should be excluded from the existing Autonomous District known as the United Khasi Jaintia Hills Autonomous District and that necessarily means that the Sub-Division area has to be taken out and formed into a new Autonomous District. Therefore, there can be no doubt that the contention about the appointment of a Commission has been satisfied and that in fact the Commission which was appointed by the Governor, has recommended the creation of a new Autonomous District on the lines ultimately adopted in the impugned notification.

It still remains to consider whether the other two conditions prescribed in paragraph 14 have been satisfied or not. Has the Governor considered the report submitted by the Commission and made his recommendations, and have those recommendations along with the report been placed before the Legislature by the

Minister concerned along with an explanatory memorandum ? As to the latter requirement, there is no dispute. The evidence shows that the report along with an explanatory memorandum was placed by the Minister concerned before the Legislature. This memorandum set out the history about the appointment of the Commission, and the receipt of its report ; and it added that :

“ after a careful consideration of the report and the recommendations of the Governor, the Government has decided to accept the recommendations of the Commission and give effect to them by taking necessary administrative and other steps in this direction.”

The main controversy centres round the question as to whether the Governor considered the report and made his recommendations.

In pressing his argument that it is not shown that the Governor considered the report and made his recommendations thereon, Mr. Setalvad assumes that the Governor, in the context, is not functioning as the Constitutional Governor who receives the advice of his Council of Ministers, but is functioning in his own individual character as Governor ; and before the validity of the notification can be upheld, it must be established that the Governor did consider the report and did make his own recommendations. It is not seriously disputed by Mr. Setalvad that the power which is conferred on the Governor by para. 1 (3) of the Sixth Schedule, has to be exercised by him as a Constitutional Governor ; that is to say, he must act on the advice of his Council of Ministers. It is also not disputed by Mr. Setalvad that ultimately it is the Government of Assam which has to decide what action to take in such matter. Paragraph 14 (2) expressly says that the explanatory memorandum which has to be laid before the Legislature of the State must indicate the action proposed to be taken by the Government of Assam. Mr. Setalvad, however, argues that having regard to the context of para. 14 (2), it is clear that the Governor acts on his own in considering the report and making his recommendations. His suggestion is that under para. 14 (2), the report must first go to the Governor ; he must consider it and make his recommendations ; and the Council of Ministers must then decide what action to take. After that stage is over, the report, and the explanatory memorandum drawn by the Government of Assam had to be placed before the Legislature of the State.

According to the respondents, what actually happened in the present case was that after the report of the Commission was received, the Council of Ministers considered the report at its meeting on the 28th April, 1964, and decided to accept the recommendations of the Commission. An explanatory memorandum was then drawn up, and the whole file was placed before the Governor. After the Governor read the file, on the 21st September, 1964, he wrote on it “ Seen, thanks ”. The affidavit filed by the respondents shows that after the matter was considered by the Council of Ministers, the proceedings were placed before the Governor, and he read the proceedings and expressed his concurrence with the words “ Seen, thanks ”. The question is whether the procedure thus followed in the present case complied with the relevant conditions prescribed by para. (14) or not.

For the purpose of dealing with this aspect of the matter in the present appeal, we are prepared to assume that when para. 14 (2) refers to the Governor, it refers to him as Governor who must act on his own and not be assisted by the advice tendered to him by the Council of Ministers. Even on that assumption, we are unable to see how the procedure followed in the present case can in substance, be said to contravene the substantial requirements of para. 14 (2). What para. 14 (2) requires is that before the matter goes to the Legislature of the State, the Governor must apply his mind to it and make his recommendations on it. It would be unreasonable to suggest that in considering the report, the Governor is precluded from receiving the assistance of the Council of Ministers before he makes up his mind as to what recommendations should be sent before the Legislature of the State. If the Governor thinks that the questions raised by the report should first be considered by the Council of Ministers and then submitted to him, we do not see how it can be said that

para 14 (2) has not been complied with. On the other hand, if the Governor, in the context, is expected to act as a Constitutional Governor, it would be appropriate that the matter should first be examined by the Council of Ministers and then submitted to him for his own recommendations. However one looks at it, the facts disclosed in the counter affidavit filed on behalf of the State of Assam unmistakably show that the matter has been considered both by the Governor and the Council of Ministers and they are all agreed that the recommendations of the Commission should be accepted. The criticism that the Governor has not made any recommendations as such, but has merely contented himself with making a short note "Seen, thanks" has in our opinion, no substance. We have looked at the counter affidavit filed on behalf of the State of Assam and have examined the other documentary evidence to which our attention was drawn. In the present case, the record clearly shows that the Commission recommended that a new Autonomous District should be created, the Governor agreed with the said recommendation, and so did the Council of Ministers. Therefore, we see no reason to interfere with the majority decision of the High Court that the power conferred on the Governor by paragraph 1 (3) of the Sixth Schedule has been validly and properly exercised by him.

The result is, the appeal fails and is dismissed with costs.

Hidayatullah J—The appellant impugns the judgment of the High Court of Assam and Nagaland at Gauhati dated 5th February 1965, by which his petition under Art 225 of the Constitution filed to challenge notification No T A D R/50/64 dated 23rd November 1964 which set up an Autonomous District of Jowai after separating the Sub-Division of Jowai from the United Khasi Jaintia Hills Autonomous District, was dismissed. According to the appellant the Notification forming the new autonomous district was ineffective without an amendment of the Sixth Schedule of the constitution by Parliamentary legislation, and even by itself was insufficient because some necessary steps leading up to the notification were not taken. In the High Court the petition, from which this appeal arises by a certificate under Art 132 of the High Court was heard by a Full Bench and was rejected by majority. The learned Chief Justice (Dutta, J, concurring) was of the view that the contentions of the appellant were unsupportable while C S Nayudu, J, was of the opposite opinion.

I have had the benefit and the privilege of reading the judgment just delivered by my Lord the Chief Justice, but I have the misfortune to disagree with the conclusion that this appeal should be dismissed. The facts are fully set out by my Lord and I need not repeat them. Before I give my reasons why I hold that this appeal should succeed, I find it convenient to refer to the constitutional provisions bearing upon this matter which I apprehend differently.

Originally the territories of India consisted of the States named in Parts A, B and C of the First Schedule and the territories specified in Part D of the same schedule. There were 9 States in Part A, 9 in Part B and 10 in Part C, Part D consisted of the Andaman and Nicobar Islands. Assam was the first State to be named in Part A. Its territories were described as follows—

"The territory of the State of Assam shall comprise the territories which immediately before the commencement of this Constitution were comprised in the Province of Assam, the Khasi States and the Assam Tribal Areas."

Different parts in the Constitution laid down provisions as to the administration of the different States in the First Schedule. Part VI dealt with States in Part A, Part VII with States in Part B, Part VIII with States in Part C, Part IX with territories in Part D and such other territories not specified in the First Schedule and Part X with the Scheduled and Tribal Areas.

After the Constitution (7th Amendment) Act, 1956, the whole of the First Schedule was substituted by another Schedule and some of the States had to be re-named and classified, as a result of the reorganisation of the States. Indian

territory thereafter stood divided into : I the States (14 in number) and II the Union territories (6 in number). The reference to the territories of Assam was also altered and it now reads :

"The territories which immediately before the commencement of this Constitution were comprised in the Province of Assam, the Khasi State and the Assam Tribal Areas, but excluding the territories specified in the Schedule to the Assam (Alteration of Boundaries) Act, 1951."

The Parts of the Constitution dealing with the administration of the several territories, already mentioned, were also revised. Part VI continued to govern the administration of the States and Part VIII continued to govern the administration of the Union territories. Such changes as were necessary in view of the reorganisation effected in the First Schedule were, of course, made in these two Parts, but I am not concerned with them. Parts VII and IX were repealed as they were not required. Part X continued as before with an amendment deleting reference to States in Part A or Part B of the First Schedule. As Part X consists of a single article it may conveniently be set down here :

"244. Administration of Scheduled Areas and tribal areas.

(1) The provisions of the Fifth Schedule shall apply to the administration and control of the Scheduled Areas and Scheduled Tribes in any State other than the State of Assam.

(2) The provisions of the Sixth Schedule shall apply to the administration of the tribal areas in the State of Assam."

We are really not concerned with the first clause of Art. 244 but it may be noticed that there are two different schedules. Schedule 5 is for Scheduled Areas and Scheduled Tribes in States other than Assam and Schedule 6 is for the tribal areas in the State of Assam. It may also be noticed that the Fifth Schedule contemplates not only *administration* but also *control* of the areas referred to in Article 244 (1) while the Sixth Schedule refers to *administration only and not control*. When I contrast the provisions of these two schedules the last distinction will have some materiality. We are concerned with the tribal areas in the State of Assam and the entire question falls to be considered under the Sixth Schedule. There is no connection between Part I and Part X and the provisions of the latter Part cannot be amplified by the provisions of the former in any respect. This is fact which is fundamental to the view I am going to put forward.

Although strictly speaking we are not concerned with the Fifth Schedule, I shall refer to it briefly because it enables us to see the special and very different provisions regarding the tribal areas in the State of Assam. Scheduled Areas and Scheduled Tribes situated in other Parts of India are governed in common by the Fifth Schedule. The tribal areas in Assam are, however, separately provided for. The difference between the two Schedules throws some light upon the way the Sixth Schedule is intended to work and it shall be my endeavour to unravel that working but I shall begin with analysing the Fifth Schedule first.

The Fifth Schedule is divided into four Parts A, B, C and D and consists of seven paragraphs. Part A is general. Paragraph 2 in that Part says that subject to the provisions of the Fifth Schedule the Executive power of the State extends to the Scheduled Areas in a State. Paragraph 1 excludes the State of Assam from the expression "State". As we shall see presently, the Sixth Schedule does not contain such provision at all. The Executive power of the State of Assam has not been extended to the tribal areas in Assam. Paragraph 3 of the Fifth Schedule then requires the Governor of each State to report to the President, annually or as often as required by the President, regarding the administration of the Scheduled Areas in the State and the executive power of the Union extends to the giving of directions to the State as to the administration of the areas. Again, there is no provision of this kind in the Sixth Schedule. The only control of the President there, is in respect of a portion of the Tribal Area described in Part B of Paragraph 20 to which I shall refer later. Reverting to the Fifth Schedule: Part B, which is headed 'Administration and Control of the Scheduled Areas and Scheduled Tribes, contains the following scheme. Under paragraph 4, Tribes Advisory Councils are to be established. The duty of

these Councils is to advice on matters pertaining to the welfare and advancement of the Scheduled Tribes in the State, referred to the Councils by the Governor. The affairs of the Councils are governed by rules made by the Governor. By paragraph 5 the Governor is authorised to direct by public notification that any particular Act of Parliament or of the Legislature of the State shall not apply to a Scheduled Area or any part of the Scheduled Area in the State and in applying the law the Governor can make such exceptions and modifications as he may specify. The Governor is given the power to make regulations for the peace and good Government of any area in a State which is for the time being a Scheduled Area. The words 'peace and good Government' were always understood as giving the utmost discretion in law making. *Reil v The Queen*¹ and *Peare Dusadh v Emperor*². In making the law the Governor has been given the power to repeal or amend any Act of Parliament or of the Legislature of the State or any existing law which is for the time being applicable to the area in question. The words 'exceptions and modifications' have also been interpreted as giving powers of amendment. *Queen v Burah*³. These are legislative powers of a very wide nature. They are subject to two restrictions only. The first is that before making any regulation the Governor shall consult the Council and all regulations must be submitted to the President and until assented to by him do not have effect. Part C consists of one paragraph. This is paragraph 6. By subparagraph (1) the expression 'Scheduled Areas' is defined as such areas as the President may by order declare to be Scheduled Areas. The President has passed two such orders in 1950 relating to Part A and Part B States respectively. By subparagraph (2) the President may at any time by order —

(a) direct that the whole or any specified part of a Scheduled Area shall cease to be a Scheduled Area or a part of such an area,

(b) alter but only by way of rectification of boundaries any Scheduled Area

(c) on any alteration of the boundaries of a State or on the admission into the Union or the establishment of a new State declare any territory not previously included in any State to be or to form part of a Scheduled Area and any such order may contain such incidental and consequential provisions as appear to the President to be necessary and proper but save as aforesaid the order made under subparagraph (1) of this paragraph shall not be varied by any subsequent order.

Part D then lays down that Parliament may, from time to time, by law amend the Schedule by way of addition variation or repeal any of the provisions and such an amendment shall not be deemed to be an amendment of the Constitution for the purpose of Art. 368.

To summarize under the Fifth Schedule the Governor is the sole legislature for the Scheduled Areas and the Scheduled Tribes. He makes the Regulations after consulting the Tribes, Advisory Council and submits them to the President for the latter's assent. The executive authority of the State extends to the Scheduled Areas but the executive authority of the Union extends to giving of directions to the State as to the administration of such areas. These areas are determined by the President by an order and may be altered from time to time by the President by another order but the President cannot alter an order made under subparagraph (1) except as laid down in clauses (a), (b) and (c) of the second subparagraph. Any amendment of the Schedule must be done by Parliament. I shall now turn to the Sixth Schedule which differs in many significant respects.

The gist of the provisions as to the administration of Tribal Areas in Assam is contained in the first and second subparagraphs of paragraph 1. It is that the tribal areas in each item of Part A of the table appended to paragraph 20 of the Schedule shall be Autonomous District, and if there are different Scheduled Tribes in an Autonomous District the Governor may, by public notification, divide the area or areas inhabited by them into autonomous regions. The word 'autonomous', that is to say, the possession of the right of self Government is the key note of the provision. As will appear presently, the Legislature, the executive and the judiciary

1 (1885) L.R. 10 A.C. 675

2 (1943) F.L.J. (F.C.) 187 (1944) 1

M.L.J. 305 (1944) F.C.R. 61

3 (1878) L.R. 3 A.C. 889

(except the High Court) in the State of Assam do not freely function for these autonomous districts. The Table attached to the Schedule gives the list of these districts and the Tribal areas. It has been changed by Parliamentary legislation from time to time.

“TABLE

PART A

1. The United Khasi-Jaintia Hills District.

2. The Garo Hills District.

3. The Mizo District.

4. * * * * *

5. The North Cachar Hills.

6. The Mikir Hills.”

[The name Mizo District was substituted for the Lushai Hills District by the Lushai Hills District (Change of Name) Act, 1954 (XVIII of 1954) and item No. 4 “Naga Hills District” was omitted and was substituted as “Naga Hills-Tuensang Area” as item 2 in Part B by the Naga Hills-Tuensang Area Act, 1957 by Act [XLII of 1957].

PART B

“1. North East Frontier Tract including Balipara Frontier Tract, Tirap Frontier Tract, Abor Hills District and Misimi Hills District.

2. The Naga Hills-Tuensang Area.”

[Item 2 has been deleted by the State of Nagaland Act, 1962 (XXVII of 1962)].

How deep is the autonomy in the Autonomous Districts and in the Autonomous Regions can be gauged by a short survey of some of the other paragraphs of the Schedule. Under paragraph 2 provision is made for constitution of District Councils and Regional Councils which have power after they are constituted under rules framed by the Governor to make rules for their own composition, delimitation of the constituencies, qualifications of voters, conduct of elections and generally for the conduct of business before them and the appointment of officers. Their powers and jurisdictions go much further than that of ordinary local authorities. They have under paragraph 3 power to make laws for various matters and such laws are effective after the Governor assents to them. Under paragraph 4 the administration of justice is entirely under the control of the District and Regional Councils and they can constitute Courts and appoint persons to be presiding officers of such Courts and no other Court, except the High Court of the State and the Supreme Court, has jurisdiction over suits or cases assigned to the Courts so set up. The Councils can also frame regulations (with the previous approval of the Governor) laying down the procedure to be followed in trial of cases and regarding such appeals as may be prescribed. Under paragraph 5 the Governor may, for the trial of suits or cases arising out of any law in force in any autonomous district or region being a law specified in that behalf by the Governor, or for the trial of offences, punishable with death, transportation for life, or imprisonment for a term of not less than five years under the Indian Penal Code or under any other law for the time being applicable, confer on the District Council or the Regional Council, having authority over such district or region, or on Courts constituted by such District Council or on any officer appointed in that behalf by the Governor, such powers under the Code of Civil Procedure, 1908 or as the case may be, the Code of Criminal Procedure, 1898, as he deems appropriate. The two Codes above mentioned apply only thus far and no further. Paragraph 6 gives power to the District Council to establish primary schools, dispensaries, markets, cattle pounds, ferries, fisheries roads and waterways in the district and to prescribe the language of instruction. Under paragraph 7 District and Regional Funds have to be constituted to finance administration. Under paragraph 8 powers to assess and collect land revenue on principles followed generally by the Government of Assam and to impose specified taxes is given. Under para-

graph 9 the District Councils are entitled to a fair share of the royalties accruing from licenses and leases for the purpose of prospecting for or the extraction of minerals granted by the Government of Assam in respect of any area within an autonomous district. In case of dispute the Governor is to decide the matter in his discretion. Under paragraph 10 the District Council can make regulations for controlling and regulating money lending and trading within the District and for licensing of certain trades and of money lenders. All laws, regulations or rules made by the District and Regional Councils are to be published in the Official Gazette of the State and on publication have the force of law. Paragraph 12 provides that no Act of the Legislature of the State in respect of which the District or Regional Councils have power to make law shall apply unless the District Council by public notification directs and the District Council can in so applying the law make any exceptions or modification it thinks fit. In respect of any other law made by Parliament or the Legislature of the State the Governor shall determine whether it shall not apply to the autonomous districts or regions and if so the Governor may make such exceptions or modifications as he may notify with or without retrospective effect. Under paragraph 13 the estimated receipts and expenditure pertaining to autonomous districts have to be separately shown in the annual financial statement of the State and laid before the Legislature of the State under Article 202. I shall omit paragraph 14 at this stage and come back to it later. Under paragraph 15 the Governor may annul any act or resolution of a District or Regional Council which is likely to endanger the safety of India and may even assume to himself all or any of the powers vested in the Councils. Any order made by the Governor is to be laid before the Legislature of the State and unless revoked by it continues for a period of 12 months and if so resolved by Legislature for a further period of twelve months unless cancelled earlier by the Governor himself. The Governor may on the recommendation of a Commission appointed under paragraph 14 dissolve a Council, direct fresh general election, and subject to the previous approval of the Legislature of the State, assume the administration or place it under the said Commission. No action to assume the administration shall be taken by the Governor without giving the Council affected an opportunity of placing its views before the Legislature of the State. Paragraph 17 enables the Governor to exclude an autonomous district in forming constituencies in the District. I shall presently refer to paragraph 18 which applies the abovementioned provisions with some modifications to Part B of the Table appended to the Schedule. Paragraph 19 includes transitional provisions. The Governor was required by that paragraph to constitute a District Council for each autonomous district in the State and till then the administration of the District was to vest in him. He could make regulations for the peace and good government and they were to become law on the President's assent. He could also direct the application of an Act of Parliament or of the Legislature of the State with such exceptions and modifications as he thought fit and unless he applied it the law was inapplicable in the districts.

These are the provisions for the administration of Autonomous Districts and Regions. To summarize the laws made by Parliament or the Legislature of the State do not run automatically in these areas. The laws are either made by the District Councils or are applied by them. The administration of justice is achieved by the District and Regional Councils through their own agencies except that in serious offences the Governor has to decide whether to invest the Councils and the Courts set up by the Councils with jurisdiction to try them. The Councils enjoy the powers of taxation and establishing of institutions mentioned in paragraph 6. They have their own funds. Some actions of the District or Regional Councils are capable of being annulled by the Governor and the Governor may even dissolve the Councils. There is complete autonomy as far as the powers and jurisdiction of the Councils go. A check is supplied by the Governor and the Legislature of the State comes into picture only when the Governor takes action against the Councils to revoke their Acts or Resolutions or dissolves them and takes over the administration himself.

I shall now refer to the paragraphs I did not mention so far. I shall begin by referring to paragraph 18. That paragraph may be reproduced here :

"18. Application of the provisions of this Schedule to areas specified in Part B of the table appended to paragraph 20.—

(1) The Governor may—

(a) subject to the previous approval of the President, by public notification, apply all or any of the foregoing provisions of this Schedule to any tribal area specified in Part B of the table appended to paragraph 20 of this Schedule or any part of such area and thereupon such area or part shall be administered in accordance with such provision, and

(b) with like approval, by public notification, exclude from the said table any tribal area specified in Part B of that table or any part of such area.

(2) Until a notification is issued under sub-paragraph (1) of this paragraph in respect of any tribal area specified in Part B of the said table or any part of such area, the administration of such area or part thereof, as the case may be, shall be carried on by the President through the Governor of Assam as his agent and the provisions of Article 240 shall apply thereto as if such area or part thereof were a Union territory specified in that article.

(3) In the discharge of his functions under sub-paragraph (2) of this paragraph as the agent of the President the Governor shall act in his discretion."

Three matters are provided here. The first is that the Government may by public notification, apply all or any of the provisions of the Sixth Schedule contained in paragraphs 1—17 to any tribal area specified in Part B of the table quoted by me earlier. The second is that the Governor may exclude from that table any tribal area specified in Part B. Both these powers are subject to prior approval of the President. The third matter is that until the tribal areas in Part B are brought in line with the autonomous districts, the administration must be carried on by the Governor in his discretion as the agent of the President, in the same manner as if those areas were Union territory. These provisions show that in respect of the tribal areas in Part B the Governor acts for himself when carrying on the administration and any change as contemplated by clauses (a) and (b) of sub-paragraph (1) of Paragraph 18 must receive prior approval of the President. The State Executive or the Legislature have no say in the matter.

I now come to the provisions of paragraph 1 (3) read with paragraphs 14 and 20 under which the present action purports to be taken. It is convenient to look at paragraph 20 first. The table appended to that paragraph has already been quoted. The main part which describes the extent of the autonomous districts named in Part A of the table at the end may now be read :

"20. *Tribal Areas.*—(1) The areas specified in Part A and B of the table below shall be the tribal areas within the State of Assam.

(2) The United Khasi-Jaintia Hills District shall comprise the territories which before the commencement of this Constitution were known as the Khasi States and the Khasi and Jaintia Hills District, excluding any areas for the time being comprised within the cantonment and municipality of Shillong, but including so much of the area comprised within the municipality of Shillong as formed part of the Khasi State of Myllem :

Provided that for the purposes of clauses (e) and (f) of sub-paragraph (1) of paragraph 3, paragraph 4, paragraph 5, paragraph 6, sub-paragraph (2), clauses (a), (b) and (d) of sub-paragraph (3) and sub-paragraph (4) of paragraph 8, and clause (d) of sub-paragraph (2) of paragraph 10 of this Schedule, no part of the area comprised within the municipality of Shillong shall be deemed to be within the District.

(2-A) The Mizo District shall comprise the area which at the commencement of this Constitution was known as the Lushai Hills District.

(3) Any reference in the table below to any district other than the United Khasi-Jaintia Hills District and the Mizo District or administrative area shall be construed as a reference to that district or area at the commencement of this Constitution :

Provided that the tribal areas specified in Part B of the table below shall not include any such areas in the plains as may, with the previous approval of the President be notified by the Governor of Assam in that behalf."

These sub paragraphs give the extent of the autonomous districts. The table does not identify any area except by name but the demarcation of the areas is done by the above sub paragraphs. The tribal areas are not immutable. They can be changed, so also the autonomous districts. The question is how is this to be done. The third sub paragraph of the first paragraph lays down one of the steps. It provides :

* 1 *Autonomous districts and autonomous regions —*

- | | | | | | |
|-----|---|---|---|---|---|
| (1) | . | . | . | . | . |
| (2) | . | . | . | . | . |

(3) The Governor may, by public notification—

- (a) include any area in Part A of the said table,
- (b) exclude any area from Part A of the said table,
- (c) create a new autonomous district
- (d) increase the area of any autonomous district,
- (e) diminish the area of any autonomous district,

(f) unite two or more autonomous districts or parts thereof so as to form one autonomous district

Provided that no order shall be made by the Governor under clauses (c), (d) (e) and (f) of this sub-paragraph except after consideration of the report of a Commission appointed under sub-paragraph (1) of paragraph 14 of this Schedule

(g) define the boundaries of any autonomous district "

Some other steps are laid down in paragraph 14 mentioned here. It provides :

" 14 *Appointment of Commission to inquire into and report on the administration of autonomous districts and autonomous regions —*(1) The Governor may at any time appoint a Commission to examine and report on any matter specified by him relating to the administration of the autonomous districts and autonomous regions in the State, including matters specified in clauses (c) (d), (e) and (f) of sub-paragraph (3) of paragraph 1 of this Schedule, or may appoint a Commission to inquire into and report from time to time on the administration of autonomous districts and autonomous regions in the State generally and in particular on—

(a) the provision of educational and medical facilities and communications in such districts and regions,

(b) the need for any new or special legislation in respect of such districts and regions, and

(c) the administration of the laws, rules and regulations made by the District and Regional Councils,

and define the procedure to be followed by such Commission

(2) The report of every such Commission with the recommendations of the Governor with respect thereto shall be laid before the Legislature of the State by the Minister concerned together with an explanatory memorandum regarding the action proposed to be taken thereon by the Government of Assam

(3) In allocating the business of the Government of the State among his Ministers the Governor may place one of his Ministers specially in charge of the welfare of the autonomous districts and autonomous regions in the State "

Lastly there are the provisions of paragraph 21 and the question is whether they involve the final step or are irrelevant in this behalf. Paragraph 21 reads

" 21 *Amendment of the Schedule.*—(1) Parliament may from time to time by law amend by way of addition, variation or repeal any of the provisions of this Schedule, and, when the Schedule is so amended, any reference to this Schedule in this Constitution shall be construed as a reference to such Schedule as so amended

(2) No such law as is mentioned in sub-paragraph (1) of this paragraph shall be deemed to be an amendment of this Constitution for the purposes of Article 368

Now the case of the appellant is that although a Commission was appointed and made its report to the Governor, the Governor neither considered the report nor made his recommendations as required by paragraph 14. The Government of Assam drew up its proposals which were sent to the Governor who merely noted on the file.

"Seen Thanks" and returned the papers which were then placed before the Legislature of the State and the Legislature approved the proposals by a resolution. The contention of the appellant is that far from playing the key role which the policy underlying the Schedule envisages, the Governor left the entire matter to the Government and at the end of the deliberations expressed himself by saying "Seen Thanks" which at best was a very vague expression. In the alternative it is contended that no action could be effective without Parliamentary legislation under paragraph 21, to amend the operative portion of paragraph 20 which Parliament alone can amend. Reference is made to legislation by which the tribal areas were changed on previous occasions by Parliament. In my judgment both these criticisms are well-founded.

It will be noticed that the Governor's powers under sub-paragraph (3) of paragraph 1 are to include or to exclude any area from Part A of the Table. These are clauses (a) and (b) of this sub-paragraph. Then the powers are to create a new autonomous district clause (c), to increase clause (d) or diminish clause (e) the area of any autonomous district, unite two or more autonomous districts or parts thereof so as to form one autonomous district clause (f), define the boundaries of an autonomous district clause (g). Powers in clauses (a), (b) and (g) are not subject to the proviso and the Commission under paragraph 14 need not be consulted before taking action under them. Action taken under clauses (a), (b) and (g) need not be reported to the Legislature of the State. I shall have something to say about it later because unless clauses (a) and (b) are also considered it is not possible to interpret the other clauses.

We are concerned with powers exercisable under clauses (c), (d) and (e) and the procedure contemplated by the proviso to paragraph 1 (3) read with paragraph 14 must be followed. The Governor has issued the public notification. There is no provision which bars inquiry: Is the action taken valid? Since the action is not under clauses (a) and (b) even Part A of Table attached to paragraph 20 is not altered either directly or by implication. Paragraph 1 (3) also says nothing about the amendment of paragraph 20 and as that power cannot be implied in view of paragraph 21 that paragraph also continues unaltered. The notification thus says one thing and paragraph 20 and the Table another. This is clearly a situation which could not have been intended. This is dealing with a Constitution which no agency less than Parliament can amend. Take another example. Suppose the Governor next intends to exclude so much of the area comprised within the Municipality of Shillong as forms part of the Khasi State of Myllem. If he can do that by a notification he may but what about paragraph 20 (2) and the Table? His notification will be that the area comprised within the Municipality of Shillong as forms part of the Khasi State of Myllem shall form the autonomous district. The other part will form another autonomous district or go out of the tribal area. Suppose the Governor next divided the Khasi and Jaintia Hills sections and formed two autonomous districts by another notification. The Governor has no power under clauses (c), (d) and (e) to amend paragraph 20 or the Table. Whether he has that power over paragraph 20 even under clauses (a) and (b) is open to much doubt. The paragraph and the Table will thus remain unaltered and the notification will render them obsolete. It was argued by the learned Attorney-General that the paragraph and the Table will be impliedly amended. I regret I cannot accept this argument. We are dealing with the Constitution. It provides within itself how Schedules 5 and 6 can be amended. Any other mode of amendment is necessarily prohibited. There can be no amendment by any other agency much less an implied repeal and an implied amendment. Is the amendment of the Constitution such a simple affair that a notification of the Governor amends its provisions by implication?

I shall now consider the cases arising under clauses (a) and (b). There is some difference between clauses (a) and (b) on the one hand and clauses (c), (d), (e) and (f) on the other. It is significant that the procedure of paragraph 14 need not be followed when the Governor acts under the former group. Clauses (a) and (b) cannot therefore cover the same ground as clauses (c), (d), (e) and (f). They are not a summary of the action envisaged by the other clauses. They must represent inclu-

sion and exclusion of areas from Part A of the Table. Otherwise there would be a reference to them in the proviso. The provision covers only those cases where the area of the autonomous districts is involved and changes are made therein. The first two clauses mention the Table but not the others. Now the legislative power of the State does not extend to the tribal areas. The executive power being co-extensive with the legislative power does not extend either. In Schedule 5 the executive power has been expressly extended. In Schedule 6 there is no such extension. Similarly the word 'control' is omitted in Article 244 (2). The Union Government also have not been given the power to issue directions in the State Government as is the case in Schedule 5. There is no requirement of prior consent of the President or his approval as in the Fifth Schedule or paragraph 18 of the Sixth Schedule. A notification under clauses (a) and (b) would be subject to no control except that of Parliament. This demonstrates the utter need of Parliamentary legislation to amend the Schedule, particularly paragraph 20 and the Table.

The notification issued by the Governor is not under clauses (a) and (b) but that hardly makes any difference. It does not amend paragraph 20 or the Table. No doubt when all proper motions have been gone through the United Khasi Jaintia Hills District will be cut down by excluding the Jowai Sub-Division and the Jowai Sub-Division will emerge as an autonomous district. But one such step and the final step must be to amend the Sixth Schedule. That can only be amended by Parliament under the powers granted by paragraph 21. If the notification alone did that there would be antinomy between the notification and the Schedule. Paragraph 21 says that Parliament may amend the Schedule by way of addition, variation and repeal. In my opinion this power still remains to be exercised to complete the chain of steps necessary to alter the autonomous districts, the names and areas of which are laid down by Parliament. The Governor's notification is no doubt one of the means of achieving the change but the effectiveness can only be given by Parliament. No wonder that on three previous occasions Parliamentary power was in fact exercised. Sub-paragraph 2 (A) was added by Parliament. At that time consequential changes were also made in sub-paragraph (3) and item No. 3 of Part A of the Table was also changed. It is to be noticed that there is a difference between paragraph 6 (2) of the Fifth Schedule and paragraph 1 (3) of the Sixth Schedule. The former authorises the President to include in his order such incidental and consequential provisions as may appear to him to be necessary and proper. As this extra jurisdiction is missing the Governor acting under the Sixth Schedule can only draw up a notification. He cannot do anything more. Till Parliamentary legislation follows the final and effective step is wanting in the purported action. It is as if the keystone is missing.

This action of the Governor is, with respect, not sustainable on the other ground also. The analysis of the provisions of Schedules 5 and 6 into which I went earlier clearly demonstrates that the Governor is made specially responsible for various matters connected with the administration of the autonomous districts. We have seen above that the executive authority of the State of Assam does not extend to the autonomous districts as it does in the tribal areas in States other than Assam. Further the Union has not been given the powers to give directions as to the administrations of the autonomous districts. This is because the autonomous districts and autonomous regions are administered by Councils which, subject to the control of the Governor, function independently. What the real position of the Governor is, *vis à vis* the Councils on the one hand and the State Government on the other will be clear if we look into the history of the administration of these areas and the previous constitutional provisions relating to the excluded and partially excluded areas as they were previously called.

There are areas which were known as backward areas, were from the earliest times excluded from the operation of laws either completely or partially and they were directly administered under laws made by the Executive under the authority of the Governor General. These orders bore resemblance to the orders in Council of the Crown. As the legality of the laws was seriously in question the Indian Councils

Act of 1861, made provision validating these so-called laws, by enacting that "no rule, law or regulation made before the passing of the Act, by the Governor-General or certain other authorities shall be deemed invalid by reason of not having been made in conformity with the provisions of the Charter Act." The power, which was taken away, was again conferred on the Governor-General by the Government of India Act, 1870 (33 and 34 Vict. c. 3) and the Governor-General was allowed to legislate separately for these backward tracts. Draft regulations were submitted by the Governors-in-Council, Lieutenant Governors or Chief Commissioners and after their approval by the Governor-General became law for these areas. This state of affairs existed right down to the Government of India Act, 1915. As difficulty arose in determining what laws were in force in which area, the Scheduled Districts Act XIV of 1874 was passed which enabled public notifications to be issued. The preamble of that Act clearly sets out that the object *inter alia* was to ascertain the enactment in force in any territory and the boundaries of such territories. This Act then specified the "Scheduled tracts" and the Local Governments were given the power to extend by public notification to any Scheduled District, with or without modification, any enactment in force in British India. When the Government of India Act, 1915 was enacted, the Government of India Act, 1870 (33 and 34 Vict. c. 3) was repealed, by the 4th Schedule and section 71 was included which in effect provided the same procedure for making and applying laws as has been described above. When the Government of India Act, 1919 (9 and 10 Geo. ch. 101) was passed section 52-A was inserted which read :

"The Governor-General-in-Council may declare any territory in British India to be a 'backward tract' and may, by notification, with such sanction as aforesaid, direct that this Act shall apply to that territory subject to such exceptions and modifications as may be prescribed in the notification."

Where the Governor-General-in-Council has, by notification, directed as aforesaid, he may, by the same or subsequent notification, direct that any Act of the Indian Legislature shall not apply to the territory in question or any part thereof, or shall apply to the territory or any part thereof, subject to such exceptions or modifications as the Governor-General thinks fit, or may authorise the Governor-in-Council to give similar direction as respects any Act of the local legislature."

Thus at the inauguration of the Government of India Act, 1935 the position was that the Governor-General-in-Council or the Governor etc., under his directions legislated for these backward tracts and the Governor-General could direct that any Act of the Indian Legislature should not apply at all or should apply with such exceptions and modifications as the Governor-General might think fit. Most of these areas were excluded from the legislative powers of the Central and Provincial legislatures and the Governors were responsible for their administration. In the Bill of the Government of India Act, 1935 the distinction between the excluded and partially excluded areas was made. This followed the White Paper and a Sixth Schedule was framed in which the list of these areas was given. But this Schedule was withdrawn and the designation of the areas was done by the Government of India (Excluded and Partially Excluded Areas) Order, 1936 dated 3rd March, 1936. The distinction between the excluded and partially excluded areas was this : Excluded areas came directly under the Governor in his discretion and therefore the administration of the areas was a direct responsibility of the Governor himself. (Parl. Debates, Volume 301, column 1395). In the Report of the Joint Committee it was stated (para. 67) that in spite of Provincial Autonomy,

"the Excluded Areas, (i.e., tracts where any advanced form of political organisation is unsuited to the primitive character of the inhabitants).....will be administered by the Governor himself and Ministers will have no constitutional right to advise him in connection with them."

Paragraph 89 again stated that "Ministers shall advise the Governor in all matters other than the administration of Excluded Areas." The position about the Excluded Areas was summed up in paragraph 144 of the Report thus :

"It is proposed that the powers of a Provincial Legislature shall not extend to any part of the Province which is declared to be an "Excluded Area" or a "Partially Excluded Area." In relation to the former, the Governor will himself direct and control the administration ; in the case of the latter he is declared to have a special responsibility. In neither case will any Act of the Provincial Legislature apply to the Area, unless by direction of the Governor given at his discretion."

with any exceptions or modifications which he may think fit. The Governor will also be empowered at his discretion to make regulations having the force of law for the peace and good government of any Excluded or Partially Excluded Area. We have already expressed our approval of the principle of Excluded Areas and we accept the above proposals as both necessary and reasonable so far as the Excluded Areas proper are concerned. We think, however, that a distinction might well be drawn in this respect between Excluded Areas and Partially Excluded Areas and that the application of Acts to or the framing of Regulations for Partially Excluded Areas is an executive act which might appropriately be performed by the Governor on the advice of his Ministers; the decisions taken in each case being of course subject to the Governor's special responsibility for Partially Excluded Areas that is to say being subject to his right to differ from the proposals of his Ministers if he thinks fit.

The administration of these areas thus followed the analogy of the Governor General's reserved departments, and the expenditure for these areas required by the Governor whether from the Provincial or Central revenues was not subject to the vote of the Provincial Legislature. In the administration of the Tribal areas the Governor was to act as the agent of the Governor General. The administration of the partially excluded areas was a special responsibility of the Governor General.

These provisions of the Government of India Act were, therefore, so designed that the "Excluded Areas" were excluded from the Provincial and Central Legislatures and the administration of these areas was vested in the Governor in his discretion while the administration of the 'partially excluded areas' was in the control of the Ministers subject to the special responsibilities of the Governor acting in his individual judgment.

As regards the machinery for transfer of areas the Parliamentary Debates (Vol. 299, columns 1553-54) contain the following policy statement:

"There is bound to be infiltration from one district to another and in the course of times we may be able to bring certain of these districts under the ordinary administration. In that case there ought to be power to make the transfer and the powers ought to be exercised in such a way that there is Parliamentary protection behind the transferred area. We ensure that the transfer can only be undertaken by an Order in Council which has to obtain the approval of both Houses."

The Order in Council now has the counterpart in the notification of the Governor and the approval of the Parliament has its counterpart in the amendment of Schedules 5 and 6 which our Parliament alone can undertake.

The resulting position was the enactment of sections 91 and 92 in the Government of India Act 1935 which may be set out here:

91 *Excluded areas and partially excluded areas*—(1) In this Act the expressions "excluded area" and "partially excluded area" mean respectively such areas as His Majesty may by Order in Council declare to be excluded areas or partially excluded areas.

The Secretary of State shall lay the draft of the Order which it is proposed to recommend His Majesty to make under this sub-section before Parliament within six months from the passing of this Act.

(2) His Majesty may at any time by Order in Council—

(a) direct that the whole or any specified part of an excluded area shall become or become part of a partially excluded area,

(b) direct the whole or any specified part of a partially excluded area shall cease to be a partially excluded area or a part of such an area,

(c) alter but only by way of rectification of boundaries any excluded or partially excluded area,

(d) on any alteration of the boundaries of a Province or the creation of a new Province, declare any territory not previously included in any Province to be or to form part of an excluded area or a partially excluded area,

and any such Order may contain such incidental and consequential provisions as appear to His Majesty to be necessary and proper but save as aforesaid the Order in Council made under sub-section (1) of this section shall not be varied by any subsequent order."

92 *Administration of excluded areas and partially excluded areas*—(1) The executive authority of a Province extends to excluded and partially excluded areas therein but notwithstanding anything in this Act, no Act of the Federal Legislature or of the Provincial Legislature shall apply to an excluded area or a partially excluded area unless the Governor by public notification so directs, and the Governor in giving such a direction with respect to any Act

may direct that the Act shall in its application to the area, or to any specified part thereof, have effect subject to such exceptions or modifications as he thinks fit.

(2) The Governor may make regulations for the peace and good government of any area in a Province which is for the time being an excluded area, or a partially excluded area, and any regulations so made may repeal or amend any Act of the Federal Legislature or of the Provincial Legislature, or any existing Indian law, which is for the time being applicable to the area in question.

Regulations made under this sub-section shall be submitted forthwith to the Governor-General and until assented to by him in his discretion shall have no effect, and the provisions of this Part of this Act with respect to the power of His Majesty to disallow Acts shall apply in relation to any such regulations assented to by the Governor-General as they apply in relation to Acts of a Provincial Legislature assented to by him.

(3) The Governor shall, as respects any area in a Province which is for the time being an excluded area, exercise his functions in his discretion."

After these two sections were enacted the Scheduled District Act, 1874, became obsolete and was repealed by the Adaptation of Laws Order, 1936.

The question is : has the position changed in any way ? I think not. The fundamental fact, as I said before, is that Article 244 (2) very tersely says that the provisions of the Sixth Schedule shall apply to the administration of the tribal areas in the State of Assam. No inspiration can, therefore, be drawn from the other parts of the Constitution. No doubt the Governor is the constitutional head of the State of Assam having a Council of Ministers. But the history of these backward tracts and the scheme of the Sixth Schedule show that the Governor is intended to discharge special functions in the administration of the Tribal Areas in Assam in which a start in democratic institutions is being made. There is no dyarchy in the tribal areas in Assam so that the Governor may be induced by the Council of Ministers to do contrary to what his judgment requires. Nor are the functions of the Governor made subject to the scrutiny of the Government of Assam. Indeed the Government of Assam is mentioned in four places only and an examination reveals that no special power has been granted to it at least in three places. In paragraph 3 (a) proviso it is provided that no law of the District or Regional Councils shall prevent the compulsory acquisition of land for public purposes by the Government of Assam, in paragraph 8 the assessment of land revenue and its collection by the Councils is to be in accordance with the principles followed by the Government of Assam in the State of Assam generally, in paragraph 9 if any dispute arises between the Councils and the Government of Assam over the distribution of royalties the Governor is to decide in his discretion what the share of each should be. The fourth and the last reference is at the end of paragraph 14 (2). Under that paragraph there is provision for the appointment of Commissions for various purposes mentioned in the paragraph and paragraph 16. One such commission considers the formation of and changes in the autonomous districts as contemplated by paragraph 1 (3), (c), (d), (e) and (f). The sub-paragraph contemplates all these reports because the report of every commission appointed for any purpose mentioned in paragraph 14 (1) or paragraph 16 together with the recommendations of the Governor and an explanatory memorandum regarding the action proposed to be taken thereon by the Government of Assam has to be laid before the Legislature of the State. Confining myself to the changes in autonomous districts contemplated by paragraph 1 (3) (c), (d), (e) and (f), it is clear that if the State Government agreed with the Governor there would be no need of explaining what action the Government was going to take. The State Government would not then be required to take any action (apart from implementing the decision administratively) and the Governor would notify the changes. The need for an explanatory memorandum regarding the action proposed to be taken by the Government would really arise in a situation in which the Governor's recommendations are not accepted by the State Government. We must not forget that there are many other matters for which diverse commissions may be appointed and there would be different kinds of reports. There may be room for detailed differences over the reports of other commissions which the Legislature may have to consider. The Governor must be expected to act independently and not with the advice of Ministers. Should differences arise the Legislature would decide.

It is intended to wield control over the Governor. It is the authority to decide whether over the Governor's action in annulling or suspending acts and resolutions of District and Regional Councils should continue or not. The Governor also has to obtain the previous approval of the Legislature of the State before assuming the administration of the area of a Council dissolved by him and the Council must be heard by the Legislature. There would be no need to bring in the Legislature if the Governor was already being advised by his Council of Ministers. Apart from this control of the Legislature of the State in specified matters, there is nothing to show that in addition the District and Regional Councils which are autonomous in almost every way, they are to be controlled by the Council of Ministers through the Governor.

It is in this background that the action of the Governor must be considered and the totality of the action taken this time compared with what was done in the past. I shall first take the facts. The Commission made its report on the 24th January, 1964. In the opinion of Nayudu, J., it is mentioned that the entire proceedings were placed before the High Court and the learned Judge observes that on 28th August, 1964 there was a note taken on the file which read "In the present case we have not referred the matter to H. E. (the Governor) at any stage."

The report together with the explanatory memorandum regarding the action proposed to be taken by the Government of Assam was placed before the Legislature of the State on 25th September, 1964. This memorandum in its last paragraph said

After a careful consideration of the report and the recommendation of the Governor the Government has decided to accept the recommendations of the commission and give effect to them by taking necessary administrative and other steps in this direction.

There is no doubt a mention of the "recommendations" of the Governor but no point of fact there was no recommendations. All that the Governor did was to see the file before it went to the Legislature and wrote "Seen, thanks". This in my opinion, and I say it respectfully, hardly squared with the special responsibilities contemplated by the Sixth Schedule. When we turn to the Commission's recommendations we find some confusion as to whether a separate Regional Council was being recommended for Jowai Sub-Division or a separate autonomous district. The recommendation of the Commission reads —

"To sum up, we feel that if the inhabitants of the Jaintia Hills work together and maintain the existing system of administration, there is no reason why a separate District Council for Jowai should not be a success. The establishment of a separate District Council would, we think, resolve the prevailing tension and bitterness due to lack of uniformity in administration, between them and the Khasis and we hope lead to a better understanding between them."

We accordingly recommend the creation of a new Autonomous District Council for the Jowai Sub-Division of the United Khasi and Jaintia Hills Autonomous District by excluding the areas comprising the areas of the said Sub-Division from the United Khasi and Jaintia Hills Autonomous District. As we see it, the main obstacle to smooth working of the new District Council will be the Jaintias who are opposed to bifurcation.

In conclusion, we may point out that, according to the 1961 Census, the area of Jowai Sub-Division is 1,515 square miles with a population of 82,147 compared with 1,888 square miles and population of 54,319 in the North Cachar Hills where there is already a separate District Council.

The language is appropriate to the formation of a Regional Council but it may be conceded that on the whole an autonomous district was meant.

In view of what I have said here bearing upon the special responsibility of the Governor as envisaged by the sense and letter of the Sixth Schedule considered in the light of the long and uniform history of these backward tracts which have always been specially administered, it is perhaps right to think that the Governor was very much in the background and the initiative and the formation of opinion was by the State Government. The Governor was apparently only informed after everything was over as to what was being done. No doubt the Governor's remarks "Seen, thanks" did not express a dissent when he saw the file and it may be presumed that

he accepted the proposals of Government. But that was hardly what the Sixth Schedule expected of the Governor. No material from any former occasion when the changes were made in the tribal areas, was placed before us to show the practice or procedure then followed. The only circumstance that has come to light shows that on three separate occasions parliamentary legislation was undertaken, although it is not in evidence whether it was supplemental to action under paragraph 1 (3) by the Governor or without it. It is true that legislative practice is not regarded as conclusive and it will be less so here because Parliament was always competent to act by itself to amend the Schedule. But it is a circumstance which also points in the direction that Parliamentary legislation must cap all other steps if the Schedule is to read true to the new situation. Without Parliamentary legislation amending the Schedule, readers of the Constitution will have to hunt for Governor's notifications to know what is the extent of tribal area in Assam, how it is divided into autonomous districts and what is the tribal area governed under paragraph 18. In course of time when many such notifications have issued paragraph 20 will become obsolete and out of date. On the opposite view which I have been unable to accept, it is even today, inaccurate and does not mean what it says.

In this view of the matter I am of the opinion that the appeal should be allowed and the respondent State ordered to bear costs throughout.

ORDER OF THE COURT:—In accordance with the opinion of the majority the appeal is dismissed with costs.

V.S.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—P. B. GAJENDRAGADKAR, *Chief Justice*, J. C. SHAH, S. M. SIKRI, V. RAMASWAMI AND P. SATYANARAYANA RAJU, JJ.

M/s. K.G. Khosla & Co. (P.) Ltd., Delhi

.. *Appellant**

v.

The Deputy Commissioner of Commercial Taxes, Madras Division, Madras

.. *Respondent.*

Central Sales Tax Act (LXXIV of 1956), section 5 (2)—Sales in course of import—Not liable to tax—Test.

It is wrong to say that before a sale could be said to have occasioned import it is necessary that the sale should have preceded the import. The expression "occasions the movement of goods" occurring in section 3 (a) and section 5 (2) of the Central Sales Tax Act must have the same meaning. Where the assessee contracted to supply axle box bodies to be manufactured in Belgium the goods to be inspected and certified in the factory, before the import of such goods in pursuance of such contract the sales are in the course of import of goods within section 5 (2) of Central Sales Tax Act.

Appeals by Special Leave from the Judgment and Order dated the 16th August, 1963 of the Madras High Court in Tax Cases Nos. 100, 219, 220 and 255 of 1962.

Veda Vyasa, Senior Advocate (K.K. Jain, Advocate with him), for Appellant.

A. Ranganadham Chetty, Senior Advocate (A. V. Rangam, Advocate with him), for Respondent.

The Judgment of the Court was delivered by

Sikri, J.—These two appeals by Special Leave are directed against the judgment of the Madras High Court in Tax Cases Nos. 100, 219, 220 and 225 of 1962, and involve the interpretation of section 5 (2) of the Central Sales Tax Act (LXXIV of 1956)—hereinafter referred to as the Act. The relevant facts are these. The appellant K.G. Khosla & Co., hereinafter referred to as the assessee entered into a contract

with the Director General of Supplies and Disposal, New Delhi, for the supply of axle-box bodies. According to the contract the goods were to be manufactured in Belgium and the D G I S D, London, or his representative, was to inspect the goods at the works of the manufacturers. He was to issue an inspection certificate. Another inspection by the Deputy Director of Inspections, Ministry of W H & S, Madras, was provided for in the contract. It was his duty to issue inspection notes on Form No. W S B 65 on receipt of a copy of the Inspection Certificate from the D G I S D, London and after verification and visual inspection. The goods were to be manufactured according to specifications by M/s La Brugeoies E T Nivelles Belgium. The assessee was entitled to be paid 90 per cent after inspection and delivery of the stores to the consignee and the balance of 10 per cent was payable on final acceptance by the consignee. In the case of deliveries on F O R basis the assessee was entitled to 90 per cent payment after inspection on proof of despatch and balance 10 per cent after receipt of stores by the consignees in good condition. The date of delivery was "in 8 months ex your principal's works from the date of receipt of order and the approved working drawings, i.e., delivery in India by 31st July, 1957, or earlier". The assessee was entirely responsible for the execution of the contract. Clause 17 (1) of the contract provides

'The contractor is entirely responsible for the execution of the contract in all respects in accordance with the terms and conditions as specified in the A/T and the Schedule annexed thereto. Any approval which the Inspector may have given in respect of the stores, materials or other particulars and the work or workmanship involved in the contract (whether with or without test carried out by the contractor & Inspector) shall not bind the purchaser and notwithstanding any approval or acceptance given by the Inspector it shall be lawful for the consignee of the stores on behalf of the purchaser to reject the stores on arrival at the destination, if it is found that the stores supplied by the contractor are not in conformity with the terms and conditions of the contract in all respects'.

Further, the assessee was responsible for the safe arrival of the goods at the destination. By an endorsement the D G I S D, London, was requested to issue pre-inspection delay reports regularly to all concerned, including the Railway Liaison Officer, C/o D G S & D, Shahjahan Road, New Delhi. He was also requested to endorse copies of the Inspection Certificates to the Director of Inspection, Ministry of W H & S, Bombay. It is further found by the Sales Tax Appellate Tribunal that

"the Belgian manufacturers after manufacture consigned the goods to the appellants by ship under bills of lading in which the consignee was the appellants themselves. The goods were consigned to Madras Harbour cleared by the appellant's own clearing agents and despatched for delivery to the buyers thereafter."

In pursuance of this contract, the assessee supplied axle-box bodies of the value of Rs. 1,74,029.50 to the Southern Railway at Perambur Works and of the value of Rs. 1,32,987.75 to Southern Railway, Mysore. The Joint Commercial Tax Officer held that the former sales were liable to tax under the Madras General Sales Tax Act and the latter under the Central Sales Tax Act. He rejected the contention of the assessee that the sales were in the course of import. He held that

"there was no privity of contract between the foreign seller and the Government for the goods. The goods were shipped only as the goods of the seller and intended for them. They were cleared as their own and delivered after clearance. The transaction is therefore one of intra State sales and not one in the course of import. The sale is completed only when the goods are delivered in this state and so it is not occasioning the import. It is also seen from the contract of sale that the terms of delivery are F O R Madras. Again Cl. (1) of the contract says that any approval or acceptance given by the Inspector shall not bind the purchaser and notwithstanding any approval or acceptance given by the Inspector it shall be lawful for the consignee of the stores on behalf of the purchaser to reject the stores on arrival at the destination. It will be seen from the words underlined by me that the purchaser has reserved the right to reject the goods even though an inspection of the goods might have been made. So there is no force in the argument of the dealer that the goods were appropriated to the contract of sale."

The assessee filed two appeals but the Appellate Assistant Commissioner agreeing with the Joint Commercial Tax Officer, rejected the appeals. The Appellate Tribunal on appeal held that the property in the goods had not passed on to the buyers even while the goods were with the Belgian manufacturers and that the sale by the appellants had not occasioned the imports. The Tribunal, however,

accepted the contention of the assessee that sales to the extent of Rs. 22,983.75 and Rs. 10,987.50 had taken place in the course of import as the goods had been appropriated to the contract while the goods were on the high seas.

The assessee then filed two revisions before the High Court and the Deputy Commissioner of Commercial Taxes, Madras, filed two revisions challenging the deductions of the two sums of Rs. 22,983.75 and Rs. 10,987.50. The High Court allowed the petitions filed by the State and dismissed the petition filed by the assessee. It rejected the contention of the assessee that the property in the goods must be deemed to have passed at the stage when the goods were approved by the representative in the factory of the manufacturers at Belgium. The High Court further rejected the contention of the assessee that the sale by the assessee to the Government Department had occasioned the import on the ground that "before a sale can be said to have occasioned the import, it is necessary that the sale should have preceded the import", and as the sale had not taken place at Belgium there was no question of the sale occasioning the import of the goods.

Before we deal with the merits of the appeals, we must dispose of two preliminary objections raised by Mr. Ranganadham Chetty, on behalf of the respondents. Basing himself on *Management of Hindustan Commercial Bank Ltd. v. Bhagwan Dass*¹, he urged that the assessee should have filed an application for leave to appeal before the High Court before applying for Special Leave. We see no force in this objection. It is common ground that the Madras High Court had at the relevant time consistently taken the view that no application for leave to appeal to Supreme Court lay before the High Court in matters involving revenue. In these circumstances we dispense with the requirement of Order 13, rule 2 of the Supreme Court Rules, and overrule the objection. The second preliminary objection raised by him was that the assessee should have filed four appeals and not two appeals because there were four revision petitions before the High Court. We see no force in this objection also. Two revisions were filed by the assessee and two by the State in respect of two assessment orders and they were disposed of by one common judgment. The subject-matter of the four revisions were two assessments, one under the Madras General Sales Tax Act and the other under the Central Sales Tax Act. In our opinion, the assessee was quite right in filing two appeals before this Court.

The learned Counsel for the assessee, Mr. Veda Vyasa, raised two points before us: First that the sales were in the course of import within the meaning of section 5 (2) of the Act; and secondly, that the property in the goods passed in Belgium and consequently the sales were outside the State within the meaning of Article 286 (1) (a) of the Constitution. As we are of the opinion that the assessee must succeed on the first point it will not be necessary to deal with the second point.

Section 5 (2) of the Central Sales Tax Act provides :

"5 (2). A sale or purchase of goods shall be deemed to take place in the course of the import of the goods into the territory of India only if the sale or purchase either occasions such import or is effected by a transfer of documents of title to the goods before the goods have crossed the customs frontiers of India."

Section 3 of the Act, which deals with inter-State trade and commerce may also be set out as it employs the same terminology and has been interpreted by this Court. Section 3 reads :

"A sale or purchase of goods shall be deemed to take place in the course of inter-State trade or commerce if the sale or purchase—

(a) occasions the movement of goods from one State to another ; or

(b) is effected by a transfer of documents of title to the goods during their movement from one State to another."

It is not necessary to set out the two *Explanations* to section 3.

It seems to us that the expression "occasions the movement of goods" occurring in section 3 (a) and section 5 (2) must have the same meaning. In *Tata Iron and*

*Steel Co, Ltd, Bombay v. S R Sarkar*¹, Shah, J., speaking for the majority, interpreted section 3 as follows

"In our view, therefore, within clause (b) of section 3 are included sales in which property in the goods passes during the movement of the goods from one State to another by transfer of documents of title thereto. Clause (a) of section 3 covers sales, other than those included in clause (b), in which the movement of goods from one State to another is the result of a covenant or incident of the contract of sale, and property in the goods passes in either State."

These observations of Shah, J., were cited with approval by this Court in *The Cement Marketing Co of India v The State of Mysore*². This case, it is true, was not dealing with the Central Sales Tax Act, but the Court was dealing with a similar question arising under Article 286 of the Constitution, before its amendment. But the same Bench, in dealing with a case arising under the Act (*The State Trading Corporation of India v The State of Mysore*³, again approved of the observations in *Tata Iron and Steel Co case*¹. Sarkar, J., observed thus

"The question then is, did the sales occasion the movement of cement from another State into Mysore within the meaning of the definition? In *Tata Iron and Steel Co, Ltd v S R Sarkar*¹, it was held that a sale occasions the movement of goods from one State to another within section 3 (a) of the Central Sales Tax Act when the movement is the result of a covenant or incident of the contract of sale. That the cement concerned in the disputed sales was actually moved from another State into Mysore is not denied. The respondents only contend that the movement was not the result of a covenant in or an incident of the contract of sale.

This Court then, on the facts of the case, found that the movement of cement from another State into Mysore was the result of a covenant in the contract of sale or incident of such contract. This Court did not go into the question as to whether the property had passed before the movement of the goods or not, and this was because according to the decision in *Tata Iron and Steel Co v S R Sarkar*¹, it did not matter whether the property passed in one State or the other. *Tata Iron and Steel Co case*¹ was again followed by this Court in *Singareni Collieries Co v Commissioner of Commercial Taxes, Hyderabad*⁴.

The learned Counsel for the respondent, Mr. A. Ranganadham Chetty, invited us to hold that the observations of Shah, J., in *Tata Iron and Steel Co case*¹ were obiter, and to consider the question afresh. We are unable to reopen the question at this stage. Shah, J., was interpreting section 3 of the Act, and although the Court was principally concerned with the interpretation of section 3 (b), it was necessary to consider the interpretation of section 3 (a) in order to arrive at the correct interpretation of section 3 (b). Further these observations were approved in *The Cement Marketing Co of India v The State of Mysore*², *The State Trading Corporation of India v The State of Mysore*³ and *Singareni Collieries Co v Commissioner of Commercial Taxes, Hyderabad*⁴. In the *State Trading Corporation case*³, in so far as the assessment for the assessment year 1957-58 was concerned, this Court applied the principles laid down in *Tata Iron and Steel Co, case*¹. Accordingly we hold that the High Court was wrong in holding that before a sale could be said to have occasioned import it is necessary that the sale should have preceded the import.

The next question that arises is whether the movement of axle box bodies from Belgium into Madras was the result of a covenant in the contract of sale or an incident of such contract. It seems to us that it is quite clear from the contract that it was incidental to the contract that the axle-box bodies would be manufactured in Belgium, inspected there and imported into India for the consignee. Movement of goods from Belgium to India was in pursuance of the conditions of the contract between the assessee and the Director General of Supplies. There was no possibility of these goods being diverted by the assessee for any other purpose. Consequently we hold that the sales took place in the course of import of goods within section 5 (2) of the Act, and are, therefore, exempt from taxation.

1 (1960) 11 S.T.C. 655 (1961) 1 S.C.R. 379
A.I.R. 1961 S.C. 65

2. (1964) 2 S.C.J. 287 (1963) 14 S.T.C.
375 (1963) 3 S.C.R. 777 A.I.R. 1963 S.C. 980.

3 (1963) 2 S.C. 131 (1962) 14 S.T.C. 188
(1963) 3 S.C.R. 792 A.I.R. 1963 S.C. 548

4 A.I.R. 1966 S.C. 563.

In the result the appeals are allowed, the judgment of the High Court reversed and the assessment orders quashed. The appellant will have his costs here and in the High Court. One set of hearing fee.

K.S.

Appeals allowed.

THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT :—P. B. GAJENDRAGADKAR, *Chief Justice*, J. C. SHAH, S. M. SIKRI, V. RAMASWAMI AND P. SATYANARAYANA RAJU, JJ.

The State of Bihar

.. *Appellant**

v.

Rambalak Singh "Balak" and others

.. *Respondents*

Attorney-General for India

.. *Intervener.*

Constitution of India (1950), Article 226—Habeas corpus petition by or on behalf of detenu under rule 30 of the Defence of India Rules—Release of detenu on bail pending final disposal of—Jurisdiction of High Court to order.

While entertaining a *habeas corpus* petition under Article 226 of the Constitution of India filed on behalf of a detenu who has been detained under rule 30 of the Defence of India Rules, the High Court has jurisdiction to release the detenu on bail pending the final disposal of the said *habeas corpus* petition. But the exercise of the said jurisdiction is inevitably circumscribed by the considerations which are special to such proceedings and which have relevance to the object which is intended to be served by orders of detention properly and validly passed under the Defence of India Rules. If the Court has jurisdiction to give the main relief to the detenu at the end of the proceedings, on principle and in theory, it is not easy to understand why the Court cannot give interim relief to the detenu pending the final disposal of his writ petition. The interim relief which can be granted in *habeas corpus* proceedings must no doubt be in aid of and auxiliary to the main relief. It cannot be urged that releasing a detenu on bail is not in aid of or auxiliary to the main relief for which a claim is made on his behalf in the writ petition.

Reference under Article 143 of the Constitution of India, (1965) 1 S.C.J. 847, applied.

Appeal by Special Leave from the Judgment and Order dated the 24th November, 1965 of the Patna High Court in Criminal W. J. C. No. 126 of 1965.

Lal Narain Sinha, Advocate-General for the State of Bihar and *Bajrang Sahai*, Government Advocate (*S. P. Varma*, Advocate with them), for Appellant.

D. Goburdhun and *G. N. Sinha*, Advocates, for Respondent No. 1.

C. K. Daphtary, Attorney-General for India (*B. R. G. K. Achar*, Advocate with him), for Intervener.

The Judgment of the Court was delivered by

Gajendragadkar, C. J.—This appeal by Special Leave is directed against the order passed by the Patna High Court ordering that the detenu Rambalak Singh be released on bail of Rs. 500 with two sureties of Rs. 250 each to the satisfaction of the Registrar of the High Court. The order further mentions that Mr. Girish Nandan Sinha who appeared for the detenu had given an undertaking to the Court that during the pendency of the proceedings when the petitioner is on bail, the petitioner will not indulge in any prejudicial activity or commit any prejudicial act. Mr. Lal Narain Sinha, the Advocate-General of Bihar, has urged on behalf of the appellant, the State of Bihar, that the order under appeal is without jurisdiction; and that raises an important question of law as to whether while entertaining a *habeas corpus* petition under Article 226 of the Constitution filed on behalf of a detenu who has been detained under rule 30 of the Defence of India Rules (hereinafter called the "Rules"), the High Court has jurisdiction to release the detenu on bail pending the final disposal of the said *habeas corpus* petition.

17th January, 1966.

The learned Advocate General stated at the outset that the appellant was not keen on obtaining the reversal of the order of bail which is under appeal, he argued that the appellant wanted the point of law to be decided, because it is necessary that the true legal position in this matter should not be in doubt. That is why we do not propose to deal with the facts leading to the *habeas corpus* petition on behalf of Ram balak Singh and will not consider the propriety, or the reasonableness of the order under appeal. It is true, as the learned Advocate General contends, that one rarely comes across a case where the High Court has purported to exercise its jurisdiction under Article 226 and release a detenu on bail where the order of detention has been passed under rule 30 of the Rules, but that by itself, can afford no assistance in dealing with the question of jurisdiction raised by the present appeal.

The learned Advocate General has fairly invited our attention to the observations recently made by this Court in *Reference under Article 143 of the Constitution of India*¹ Special Reference No 1 of 1964 which are relevant for the purpose of dealing with the present appeal. In that case, the Legislative Assembly of the State of Uttar Pradesh had committed Keshav Singh, who was not one of its members, to prison for its contempt. Keshav Singh had then moved the Allahabad High Court, Lucknow Bench under Article 226 of the Constitution and section 491 of the Code of Criminal Procedure challenging his committal as being in breach of his fundamental rights. He had also prayed for interim bail. The learned Judges who entertained his petition admitted him to bail, and one of the points which arose for decision before this Court in the Special Reference was whether the order passed by the High Court admitting Keshav Singh to bail was without jurisdiction.

Mr. Seervai, who had appeared for the U P Assembly, had strenuously contended that the order passed by the High Court admitting Keshav Singh to bail was without jurisdiction, and in support of his contention, he had relied upon the English practice which seems to recognise that in regard to *habeas corpus* proceedings commenced against orders of commitment passed by the House of Commons on the ground of its contempt, bail is not granted by Courts. This argument, however, was rejected by this Court, because this Court took the view that

if Article 226 confers jurisdiction on the Court to deal with the validity of the order of commitment even though the commitment has been ordered by the House, how can it be said that the Court has no jurisdiction to make an interim order in such proceedings? (p 498)

Reference was also made to an earlier decision of this Court in the *State of Orissa v. Madan Gopal Rungta and others*² where it was ruled that an interim relief can be granted only in aid of, and as auxiliary to the main relief which may be available to the party on final determination of his rights in a suit or proceeding. It is clear that this view proceeded on the well recognised principle that if jurisdiction is conferred by a statute upon a Court, the conferment of jurisdiction implies the conferment of the power of doing all such acts, or employing such means as are essentially necessary to its execution.³ Having thus rejected the contention raised by Mr. Seervai, this Court took the precaution of adding that it was not concerned to enquire whether the order admitting Keshav Singh to bail was proper and reasonable or not, all that this Court was then concerned to consider was whether the said order was without jurisdiction, and on this point the opinion expressed by this Court was that in passing the order of interim bail, the High Court cannot be said to have exceeded its jurisdiction.

The learned Advocate General does not dispute the correctness of these observations. He, however, argues that this principle cannot be invoked in cases where a detenu is detained under rule 30 of the Rules. The policy underlying the enactment of the Defence of India Act and the Rules, and the object intended to be achieved by the detention which is authorised under rule 30, clearly indicate that there are other valid considerations of paramount importance which distinguish

¹ (1965) 1 S.C.J. 847 (1965) 1 S.C.R. 413
A.I.R. 1965 S.C. 745

(1952) S.C.R. 28 A.I.R. 1952 S.C. 12
³ Maxwell on 'Interpretation of Statutes',
11th ed., p. 350

² (1951) S.C.J. 764 (1951) 2 M.L.J. 645

the detention made under rule 30 and that alters the character of the proceedings initiated by or on behalf of the detenu under Article 226. It is conceded that even in regard to orders of detention passed under rule 30, it would be competent to the High Court to order release of the detenu if the High Court is satisfied that the impugned order has been passed *mala fide*. There is also no doubt that the order of detention can be set aside, if it appears to the High Court that on the face of it, it is invalid, as for instance, when it appears to the High Court that the face of the order shows that it has been passed by an authority not empowered to pass it. But the argument is that in dealing with the question as to whether the High Court can grant interim bail to a detenu in *habeas corpus* proceedings commenced on his behalf under Article 226, the Court cannot ignore the fact that the detention purports to have been made in order to safeguard the defence of India and civil defence, public safety, maintenance of public order, India's relations with foreign powers, maintenance of peaceful conditions in any part of India, efficient conduct of military operations or the maintenance of supplies and services essential to the life of the community. The very object of making an order of detention against a citizen is to put an end to his prejudicial activities which are likely to affect one or the other of the matters of grave public importance specified by rule 30, and so, it would be illogical to hold that even before the Court comes to any decision as to the merits of the grounds on which the order of detention is challenged, it would be open to the Court to pass an interim order of bail; and that, it is urged, distinguishes *habeas corpus* proceedings in relation to orders of detention passed under rule 30 of the Rules.

We are not impressed by this argument. If on proof of certain conditions or grounds it is open to the High Court to set aside the order of detention made under rule 30 of the Rules, and direct the release of the detenu, we do not see how it would be possible to hold that in a proper case, the High Court has no jurisdiction to make an interim order giving the detenu the relief which the High Court would be entitled to give him at the end of the proceedings. The general principle on which the observations of this Court were based in the Special Reference would apply as much to the *habeas corpus* proceedings commenced on behalf of a detenu detained under rule 30 of the Rules as to any other *habeas corpus* proceedings. If the Court has jurisdiction to give the main relief to the detenu at the end of the proceedings, on principle and in theory, it is not easy to understand why the Court cannot give interim relief to the detenu pending the final disposal of his writ petition. The interim relief which can be granted in *habeas corpus* proceedings must no doubt be in aid of, and auxiliary to, the main relief. It cannot be urged that releasing a detenu on bail is not in aid of, or auxiliary to the main relief for which a claim is made on his behalf in the writ petition. It is true that in dealing with the question as to whether interim bail should be granted to the detenu, the Court would naturally take into account the special objects which are intended to be achieved by orders of detention passed under rule 30. But we are dealing with the bare question of jurisdiction and are not concerned with the propriety or the reasonableness of any given order. Considering the question as a bare question of jurisdiction, we are reluctant to hold that the jurisdiction of the High Court to pass interim auxiliary orders under Article 226 of the Constitution can be said to have been taken away by necessary implication when the High Court is dealing with *habeas corpus* petitions in relation to orders of detention passed under rule 30 of the Rules.

It is, however, urged by the learned Advocate-General that the order of bail in the present proceedings and indeed any order of bail passed in such proceedings would not be interim but would be final; and that, it is pointed out, distinguishes cases of this character from other cases of *habeas corpus* petitions. The argument is that if a person is convicted and he seeks to challenge the legality of the conviction by *habeas corpus* proceedings under Article 226, the interim bail would be interim in the sense that if the proceedings fail, the person concerned will have to return to jail and run out the sentence imposed on him. Reverting to the case of Keshav Singh, it was urged that if the writ petition filed by Keshav Singh had failed, he would have been compelled to return to jail and run out the sentence pronounced on him by the U.P. Legislative Assembly.

The cases in regard to detention effected by rule 30, however, stand on a different footing. There is no period imposed by the orders of detention, they can be renewed from time to time as authorised by the respective relevant Rules, and the object of making the order is to prevent the commission of prejudicial acts of the detenu. In such a case, if the writ petition ultimately fails, it may be that the detenu returns to jail, but his return to jail under such circumstances is not comparable to the return to jail of the detenu who was convicted and who was allowed interim bail in proceedings by which he challenged the legality of his conviction.

This argument also is not well founded. It is obvious that when the High Court releases a detenu on bail pending the final disposal of his *habeas corpus* petition, the High Court will no doubt take all the relevant facts into account and it is only if and when the High Court is satisfied that *prima facie*, there is something patently illegal in the order of detention that an order for bail would be passed. The jurisdiction of the High Court to pass an interim order does not depend upon the nature of the order, but upon its authority to give interim relief to a party which is auxiliary to the main relief to which the party would be entitled if it succeeds in its petition. Therefore, considered as a mere proposition of law, we see no reason to accept the argument of the learned Advocate General that the principle enunciated by this Court in the Special Reference has no application to *habeas corpus* petitions filed under Article 226 in relation to orders of detention passed under rule 30 of the Rules.

Having thus rejected the main argument urged by the learned Advocate General, we must hasten to emphasise the fact that though we have no hesitation in affirming the jurisdiction of the High Court in granting interim relief by way of bail to a detenu who has been detained under rule 30 of the Rules, there are certain inexorable considerations which are relevant to proceedings of this character and which inevitably circumscribe the exercise of the jurisdiction of the High Court to pass interim orders granting bail to the detenu. There is no doubt that the facts on which the subjective satisfaction of the detaining authority is based, are not justiciable, and so, it is not open to the High Court to enquire whether the impugned order of detention is justified on facts or not. The jurisdiction of the High Court to grant relief to the detenu in such proceedings is very narrow and very limited. That being so, if the High Court takes the view that *prima facie*, the allegations made in the writ petition disclose a serious defect in the order of detention which would justify the release of the detenu, the wiser and the more sensible and reasonable course to adopt would invariably be to expedite the hearing of the writ petition and deal with the merits without any delay. Take the case where *mala fides* are alleged in respect of an order of detention. It is difficult if not impossible, for the Court to come to any conclusion even *prima facie*, about the *mala fides* alleged, unless a return is filed by the State. Just as it is not unlikely that the High Courts may come across cases where orders of detention are passed *mala fides* it is also not unlikely that allegations of *mala fides* are made light heartedly or without justification, and so judicial approach necessarily postulates that no conclusion can be reached, even *prima facie* as to *mala fides* unless the State is given a chance to file its return and state its case in respect of the said allegations, and this emphasises the fact that even in regard to a challenge to the validity of an order of detention on the ground that it is passed *mala fide*, it would not be safe, sound or reasonable to make an interim order on the *prima facie* provisional conclusion that there may be some substance in the allegations of *mala fides*. What is true about *mala fides* is equally true about other infirmities on which an order of detention may be challenged by the detenu. That is why the limitation on the jurisdiction of the Court to grant relief to the detenus who have been detained under rule 30 of the Rules inevitably introduces a corresponding limitation on the power of the Court to grant interim bail.

In dealing with writ petitions of this character, the Court has naturally to bear in mind the object which is intended to be served by the orders of detention. It is no doubt true that a detenu is detained without a trial, and so, the Courts would inevitably be anxious to protect the individual liberty of the citizen on grounds which are justiciable and within the limits of their jurisdiction. But in upholding

the claim for individual liberty within the limits permitted by law, it would be unwise to ignore the object which the orders of detention are intended to serve. An unwise decision granting bail to a party may lead to consequences which are prejudicial to the interests of the community at large : and that is a factor which must be duly weighed by the High Court before it decides to grant bail to a detenu in such proceedings. We are free to confess that we have not come across cases where bail has been granted in *habeas corpus* proceedings directed against orders of detention under rule 30 of the Rules, and we apprehend that the reluctance of the Courts to pass orders of bail in such proceedings is obviously based on the fact that they are fully conscious of the difficulties—legal and constitutional, and of the other risks involved in making such orders. Attempts are always made by the Courts to deal with such applications expeditiously ; and in actual practice, it would be very difficult to come across a case where without a full enquiry and trial of the grounds on which the order of detention is challenged by the detenu, it would be reasonably possible or permissible to the Court to grant bail on *prima facie* conclusion reached by it at an earlier stage of the proceedings.

If an order of bail is made by the Court without a full trial of the issues involved merely on *prima facie* opinion formed by the High Court, the said order would be open to the challenge that it is the result of improper exercise of jurisdiction. It is essential to bear in mind the distinction between the existence of jurisdiction and its proper exercise. Improper exercise of jurisdiction in such matters must necessarily be avoided by the Courts in dealing with applications of this character. Therefore, on the point raised by the learned Advocate-General in the present appeal, our conclusion is that in dealing with *habeas corpus* petitions under Article 226 of the Constitution where orders of detention passed under rule 30 of the Rules are challenged, the High Court has jurisdiction to grant bail, but the exercise of the said jurisdiction is inevitably circumscribed by the considerations which are special to such proceedings and which have relevance to the object which is intended to be served by orders of detention properly and validly passed under the said Rules.

We have already indicated that the learned Advocate-General has fairly stated that the appellant has brought the present appeal to this Court not for the purpose of challenging the correctness, propriety or reasonableness of the order under appeal, but for the purpose of getting a decision from this Court on the important question of jurisdiction raised by the said order. We do not, therefore, propose to consider the question as to whether the order under appeal is proper, reasonable or valid.

The result is, the appeal fails and is dismissed.

V.K.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—K. SUBBA RAO AND V. RAMASWAMI, JJ.

V. M. Rv. MR. Ramaswami Chettiar and another

.. *Appellants**

v.

R. Muthukrishna Aiyar and others

.. *Respondents.*

Sale of land—Vendor's liability—Warranty of title—Sale of family properties by Hindu father—Indemnity bond indemnifying against loss—"In case the share of the minor son is set aside and you are made to sustain any loss"—Suit by son to set aside the sale of his half share, decreed—Purchase in Court sale in execution of money decree against son by vendee's nominee of property so decreed—Vendee's possession not disturbed—Measure of damages.

A Hindu father sold his family properties and executed an indemnity bond undertaking to pay the amount of loss "in case the sale of half share of the son is set aside and you are made to sustain any loss".

16th February, 1966.

In a suit filed on the foot of the indemnity bond by the vendee's representatives in interest for a moiety of the purchase money and the expenses of defending the suit by the son for his half share, the trial Court found that the plaintiffs had purchased the half share of the son (decreed in his suit to set aside the sale thereof) in Court sale for Rs 736, but decreed the suit on the ground that they could recover the damages claimed on the assumption that third party had purchased in the Court sale. The High Court of Madras, in appeal, agreed with the finding of the purchase at Court sale *benami*, for the plaintiffs but modified the decree granting only the sum of Rs 736 paid at the Court sale and another sum of Rs 500 towards the cost of defending the suit by the son. Hence the instant appeal to the Supreme Court by the plaintiffs.

Held, the sale by the father was not void but only voidable at the instance of the son in respect of his half share and on proof of want of legal necessity. In such a case the indemnity bond becomes enforceable only if the vendee is dispossessed from the properties in dispute, a breach of the covenant of warranty of title can only occur on the disturbance of possession. Further, the indemnity bond states the (father) vendor shall be liable to pay the amount of loss the vendee may sustain by the action of the son.

In the instant case, the only loss sustained by the vendee's representatives (plaintiffs) was a sum of Rs 736 paid for purchase at the Court sale and Rs 500 spent for the defence of the son's suit, which they had to incur for protecting the continuance of their possession of the properties. The High Court was right in granting only Rs 1236 and interest thereon from the date of the suit.

Appeal from the Judgment and Decree dated the 7th January, 1955, of the Madras High Court in Appeal Suit No 371 of 1949.

R Ganapathy Iyer and R Thiagarajan, Advocates, for Appellants

M S K Sastri and M S Narasimhan, Advocates, for Respondent No 2

The Judgment of the Court was delivered by

Ramaswami, J—In the suit which is the subject matter of this appeal the plaintiffs alleged that Plaint 'A' Schedule properties belonged to the second defendant and his son, the third defendant. The second defendant sold the village for Rs 28,000 to one Swaminatha Sarma by a sale deed Exhibit A dated 12th December, 1912, which he executed for himself and as guardian of the third defendant who was then a minor. The second defendant also agreed to indemnify any loss that might be caused to his vendee in case the sale of his minor son's half share should later on be set aside. Accordingly the second defendant executed the Indemnity Bond—Exhibit B in favour of Swaminatha Sarma. The sons of Swaminatha Sarma sold Plaint 'A' Schedule village to the father of the plaintiffs for a sum of Rs 53,000. On the same date they assigned the Indemnity Bond—Exhibit B to the father of the plaintiffs under an Assignment Deed—Exhibit D. The third defendant after attaining majority filed O S No 640 of 1923 in the Chief Court of Pudukottai for setting aside the sale deed—Exhibit A in respect of his share and for partition of joint family properties. The plaintiffs were impleaded as defendants 108 and 109 in that suit. The suit was decreed in favour of the third defendant and the sale of his share was set aside on condition of his paying a sum of Rs 7,000 to defendants 108 and 109, and a preliminary decree for partition was also granted. In further proceedings, the village was divided by metes and bounds and a final decree—Exhibit F was passed on 6th October, 1936.

Meanwhile, a creditor of the third defendant obtained a money decree and in execution thereof attached and brought to sale the third defendant's half share in the 'A' Schedule village. In the auction sale Subbaiah Chettiar, the plaintiff's brother-in-law purchased the property for a sum of Rs 736 subject to the liability for payment of Rs 7,000 under the decree in O S No 640 of 1923. Thereafter, the plaintiffs have brought the present suit on the allegation that they have sustained damage by the loss of one half of the 'A' Schedule village and are entitled to recover the same from the second defendant personally and out of the 'B' Schedule properties. The plaintiffs have claimed damages to the extent of half of the consideration for the sale deed—Exhibit C minus Rs 7,000 withdrawn by them. The plaintiffs claimed a further sum of Rs 500 as Court expenses making a total of Rs 20,000. The suit was contested on the ground that the Court sale in favour of

Subbaiah Chettiar was benami for the plaintiffs and the latter never lost ownership or possession of a half share of the 'A' Schedule village and consequently the plaintiffs did not sustain any loss. The trial Court held that Subbaiah Chettiar—P.W. 1 was benamidar of the plaintiffs who continued to remain in possession of the whole village. The trial Court was, however, of the opinion that though the plaintiffs had, in fact, purchased the third defendant's half share in the Court sale, they were not bound to do so and they could claim damages on the assumption that third parties had purchased the same. The trial Court accordingly gave a decree to the plaintiffs for the entire amount claimed and made the payment of the amount as charge on 'B' Schedule properties. The second defendant took the matter in appeal to the Madras High Court which found that the only loss actually sustained by the plaintiffs was the sum of Rs. 736 paid for the Court sale and the sum of Rs. 500 spent for the defence of O.S. No. 640 of 1923. The High Court accordingly modified the decree of the trial Court and limited the quantum of damages to a sum of Rs. 1,236 and interest at 6 per cent. per annum from the date of the suit.

The question presented for determination in this appeal is—what is the quantum of damages to which the plaintiffs are entitled for a breach of warranty of title under the Indemnity Bond—Exhibit B dated 19th December, 1912.

It was contended by Mr. Ganapathy Iyer on behalf of the appellants that in O.S. No. 640 of 1923, defendant No. 3 obtained a partition decree and a declaration that defendant No. 2 was not entitled to alienate his share in the 'A' Schedule properties. It was submitted that on account of this decree the appellants lost title to half share of 'A' Schedule properties and accordingly the appellants were entitled to get back half the amount of consideration under the Indemnity Bond—Exhibit B. The argument was stressed on behalf of the appellants that the circumstance that the plaintiffs had a title of benamidar to the half-share of the third defendant in Court auction, was not a relevant factor so far as the claim for damages was concerned. It was suggested that the purchase in Court auction was an independent transaction and the defendants could not take the benefit of that transaction. We are unable to accept the contention of the appellants as correct. In the present case it should be observed, in the first place, that the Indemnity Bond—Exhibit B states that defendant No. 2 shall be liable to pay the amount of loss "in case the sale of the share of the said minor son—Chidambaram—is set aside and you are made to sustain any loss". In the second place, it is important to notice that the sale deed—Exhibit A executed by the second defendant in favour of Swaminatha Sarma was only voidable with regard to the share of the third defendant in the family properties. The sale of the half-share of defendant No. 3 was not void *ab initio* but it was only voidable if defendant No. 3 chose to avoid it and proved in Court that the alienation was not for legal necessity. In a case of this description the Indemnity Bond becomes enforceable only if the vendee is dispossessed from the properties in dispute. A breach of the covenant can only occur on the disturbance of the vendee's possession and so long as the vendee remains in possession he suffers no loss and no suit can be brought for damages either on the basis of the Indemnity Bond or for the breach of a covenant of the warranty of title. The view that we have expressed is borne out by the decision of the Madras High Court in *Subbaraya Reddiar v. Rajagopala Reddiar*¹, in which A who had a title to certain immovable property, voidable at the option of C, sold it to B and put B in possession thereof. C then brought a suit against A and B, got a decree and obtained possession thereof in execution. In this state of facts it was held by Seshagiri Ayyar, J., that B's cause of action for the return of the purchase-money arose not on the date of the sale but on the date of his dispossession when alone there was a failure of consideration and the article applicable was Article 97 of the Limitation Act. At page 889 of the Report, Seshagiri Ayyar, J., states :

"These cases can roughly speaking be classified under three heads : (a) where from the inception the vendor had no title to convey and the vendee has not been put in possession of the property ; (b) where the sale is only voidable on the objection of third parties and possession is taken under the voidable sale ; and (c) where though the title is known to be imperfect. The contract is in part carried

out by giving possession of the properties. In the first class of cases the starting point of limitation will be the date of the sale. That is Mr Justice Bakewell's view in *Ramanatha Iyer v. Ozhapoor Pathirani Raman Nambudripad*¹, and I do not think Mr Justice Miller dissents from it. However the present case is quite different. In the second class of cases the cause of action can arise only when it is found that there is no good title. The party is in possession and that is what at the outset under a contract of sale a purchaser is entitled to, and so long as his possession is not disturbed he is not damaged. The cause of action will therefore arise when his right to continue in possession is disturbed. The decisions of the Judicial Committee of the Privy Council in *Hanuman Iamat v. Hanuman Mandur*² and in *Bassa Iyar v. Dharm Singh*³ are authorities for this position.

A similar view has been expressed by the Allahabad High Court in *Muhammad Siddiq v. Muhammad Nuh*⁴, and the Bombay High Court in *Gulabchand Daulatram v. Surajrao Ganpatrao*⁵. In the present case it has been found by the High Court that P W 1, the auction purchaser was the brother-in-law of the plaintiffs and that he was managing the estate of the plaintiffs and defending O S No 640 of 1923 on their behalf. It has also been found that P W 1 did not take possession at any time and plaintiffs have been cultivating and enjoying the whole village all along and at no time were the plaintiffs dispossessed of the property. The only loss sustained by the plaintiffs was a sum of Rs 736 paid at the Court sale and a sum of Rs 500 spent for the defence of O S No 640 of 1923 which the plaintiffs had to incur for protecting the continuance of their possession over the disputed share of land. Accordingly the High Court was right in granting a decree to the plaintiffs only for a sum of Rs 1,236 which was the actual loss sustained by them and they are not entitled to any further amount. For these reasons we hold that there is no merit in this appeal which is dismissed with costs.

K G S

Appeal dismissed

THE SUPREME COURT OF INDIA

(Civil Appellate Jurisdiction)

PRESENT — MR P B GAJENDRAGADKAR, Chief Justice, K N WANCHOO, M HIDAYATULLAH, J C SHAH AND S M SIKRI, JJ

K. S. Abdul Azeez

Appellant*

v.

Ramanathan Chettiar and others

Respondents

Representation of the People Act (XLIII of 1951), section 39 (4) and Conduct of Election Rules, rule 4—Nomination paper filed for election to an Assembly seat—Star symbol reserved for Swatantra Party entered in the first space—The other two spaces left blank—Candidate not of Swatantra Party—If defect of substantial character—Rejection of nomination not proper

It amounted to a defect in completing the declaration so far as 'Star' was shown as the symbol and in so far as the blank spaces are concerned it showed a failure to complete the declaration as to symbols in the nomination paper, they are covered by the composite phrase "failure to complete or defect in completing the declaration as to symbols in the proviso to rule 4 of the Rules, and so they cannot be deemed to be defects of substantial character. Section 39 (4) is attracted to the instant case and the rejection of the nomination paper was not proper as held by the High Court.

Appeal from the Judgment and Order dated the 4th March, 1963, of the Madras High Court in Appeal Against Order No 300 of 1962.

R Ganapathy Iyer, Advocate, for Appellant

R Mahalingam, Advocate, for Respondents Nos 1 and 2

The Judgment of the Court was delivered by

Hidayatullah, J.—At the last General Election to the Assembly in the Madras State five candidates filed their nomination papers for the Nilakottai constituency.

¹ (1913) 14 M.L.T. 574² (1892) L.R. 18 I.A. 158 I.L.R. 10 Cal³ (P.C.)⁴ (1889) L.R. 15 I.A. 211 I.L.R. 11 All

47 (P.C.)

⁵ (1930) I.L.R. 52 All 604

A.I.R. 1930 Bom 401

* C.A. No 435 of 1965

The appellant K. S. Abdul Azceez was one of them and at the ensuing election he was successful having polled 4,000 and odd votes in excess of those of his nearest rival. Four other candidates had filed nomination papers and they included respondents 3 to 5 in this appeal. One of the candidates withdrew and the nomination paper of the 5th respondent (Peyathevar) was rejected at the scrutiny. He had shown in his nomination paper only one symbol in one of the spaces provided for three symbols and that was the star which is reserved for the Swatantra Party. He was not the accredited candidate of the Swatantra Party and as he had not shown any other symbol, the nomination paper was held to contain a defect of substance.

After the election was over two voters (who are respondents 1 and 2 in this appeal) filed an election petition against the appellant and one of the grounds urged against him was that as the rejection of the nomination paper of Peyathevar was improper, under section 100 (1) (c) of the Representation of the People Act the election was void. Other grounds on which the election was challenged need not concern us because nothing turns upon them in this appeal. The Election Tribunal held that the nomination paper was rightly rejected and dismissed the election petition negating the other allegations as to the election at the same time. On appeal by the two voters the decision of the Tribunal was reversed and it was held that the nomination paper was improperly rejected and the election of the appellant was, therefore, void. On hearing Mr. Ganapathy Iyer and looking into the relevant provisions on the subject of symbols we are satisfied that the decision of the High Court was right.

The matter has to be considered in relation to the Conduct of Election Rules, 1961. Sub-rule (1) of rule 5 enables the Election Commission to specify the symbols that may be chosen by candidates at elections and the restrictions to which their choice shall be subject. By virtue of this power the Election Commission issued a notification No. SO. 2316 dated 19th September, 1961, which showed in a table the symbols for the Madras Legislative Assembly elections. Some of these symbols were reserved for recognised political parties and the name of the party was mentioned in brackets against the reserved symbol. Symbols which were not reserved were "free symbols" and an independent candidate, such as the appellant, could choose one of them. If two or more independent candidates chose the same free symbols lots were to be drawn. These rules were in the notification and detailed reference to them is hardly necessary because the matter is perfectly plain.

The question is whether by choosing a symbol reserved for a political party and by leaving blank the space where he could have shown two other symbols as his alternative choice Peyathevar's nomination paper became so defective that it was rightly rejected. In this connection we have to see the provision of section 36 (4) of the Representation of the People Act, 1951. Sub-section (4) provides :

"The Returning Officer shall not reject any nomination paper on the ground of any defect which is not of a substantial character."

This sub-section must be read with rule 4 of the Conduct of Election Rules. It provides as follows :—

"Every nomination paper presented under sub-section (1) of section 33 shall be completed in such one of the Forms 2-A to 2-E as may be appropriate."

The Form appropriate to this election had a blank space where a candidate could show three symbols in order of preference as symbols of his choice. The appellant showed only the star in the first space and left blank the other two places. The nomination paper, therefore, did not comply with section 33 read with rule 4. The nomination paper was, however, saved by the proviso to rule 4 which reads :

"Provided that a failure to complete, or defect in completing, the declaration as to symbols in a nomination paper in Form 2-A or Form 2-B shall not be deemed to be a defect of a substantial character within the meaning of sub-section (4) of section 36."

The Tribunal held that mentioning a reserved symbol and leaving blank the space for alternative symbols, did not come within this proviso and was a defect of substance. The High Court held otherwise and, in our opinion, rightly. In so far as the blank space is concerned it showed a failure to complete the declaration as to symbols and where the star was shown as the symbol it amounted to a defect in completing the declaration as to symbol in the nomination paper. In other

words, taking the proviso as a whole the mention of the star and leaving blank rest of the space was covered by the composite phrase "failure to complete or defect in completing the declaration as to symbols"

Mr Ganapathy Iyer contends that a defect in completing the symbol is something like putting down "two bullocks" but omitting the words "with yoke on" or mentioning the "ears of corn" without mentioning "the sickle" in describing the reserved symbols for the Congress and the Communist Parties respectively. We do not agree. If an independent candidate named "star," "bicycle" and "flower" as his preferences there would be no defect in the nomination paper except one, namely, that he included the "star" a reserved symbol to which he was not entitled. The phrase "defect in completing the declaration as to symbols" would obviously cover such a case and there is no difference between that case and this where the star is shown in the first space and the rest of the space is left blank. The intention seems to be that the question of symbols should not play an important part because symbols can be assigned by political parties till the date for withdrawal and nomination paper should not be cancelled during the interval.

On the whole the decision of the High Court was right in the circumstances of this case and we see no reason to reverse it. The appeal, therefore, fails and is dismissed but as none appeared to contest it there shall be no order as to costs.

K G S

Appeal dismissed

THE SUPREME COURT OF INDIA

(Criminal Appellate Jurisdiction)

PRESENT —P. B. GAJENDRAGADKAR, Chief Justice, J. C. SHAH, S. M. SIKRI, V. RAMASWAMI AND P. SATYANARAYANA RAJU, JJ.

Godavari S. Parulekar and etc.

*Appellants**

v.

The State of Maharashtra

Respondent

Defence of India Rules (1962), rule 30—State Government delegating its powers under—If in compliance thereafter to act under rule 30—Single detention order by two Ministers—Validity—Fresh detention order during pendency of habeas corpus proceedings against an earlier order—If vitiated by malice—Satisfaction as to necessity for detention—Justiciability

Where a State Government delegates the powers conferred on it under rule 30 of the Defence of India Rules, to all the District Magistrates in the State within the limits of their jurisdiction, it cannot be contended that the State Government has thereby denuded itself of the power to act under that rule. The State Government would be competent to act under rule 30 even after it has delegated its powers thereunder to a competent authority.

The contention that two Ministers cannot legally jointly pass an order of detention under rule 30 of the Defence of India Rules, is untenable. No difficulty can be seen in two Ministers successively being satisfied that it is necessary to detain a person for different reasons and then their decision being carried out by one order of detention duly authenticated. The Supreme Court in *Godavari Shamrao Parulekar v. State of Maharashtra*, (1965) 2 S.C.J. 523, did not mean to lay down an absolute proposition of law that unless all the relevant subjects in respect of which the orders of detentions are passed are concentrated in the hands of one Minister, valid orders of detention cannot be passed.

The mere fact that a detention order is passed during the pendency of habeas corpus proceedings against an earlier order cannot by itself lead to the conclusion that the second order is vitiated by malice in law. It depends on the circumstances of each case. The detenu would have to prove not only that the detention order has been passed during the pendency of habeas corpus proceedings but also that there are other facts showing malice. If the Government considers an order of detention,

which is the subject-matter of challenge, to be invalid, there is no reason why it should not pass a valid order.

It has been consistently held by the Supreme Court that it is for the detaining authority to be satisfied whether on the material before it, it is necessary to detain a person under rule 30 of the Defence of India Rules, and that this question is not justiciable.

Appeal from the Judgments and Orders dated the 13th April, 1964 of the Bombay High Court in Criminal Applications Nos. 180-182, 189, 190, 191, 193 and 194, and 195-197 of 1964 respectively.

R. K. Garg, Advocate of *M/s. Ramamurthi & Co.*, for Appellant (In Crl. Appeal No. 142 of 1964).

All other appellants in person.

N. S. Bindra, Senior Advocate (*B. R. G. K. Achar*, Advocate, with him), for Respondent.

The Judgment of the Court was delivered by

Sikri, J.—These appeals by certificate granted by the Bombay High Court are directed against its judgment dated 13th April, 1964, in applications filed by the applicants under Article 226 of the Constitution, and section 491 of the Criminal Procedure Code. Criminal Appeal No. 143 of 1964 has become infructuous because the appellant, S. V. Parulekar, has died.

Mr. R. K. Garg appears on behalf of the appellant in Criminal Appeal No. 142 of 1964. It is common ground that the points arising in all the appeals are common, and in order to appreciate the points, it would be sufficient if the facts in Criminal Appeal No. 142 of 1964, relevant to the arguments addressed to us, are only given. The relevant facts given in paragraphs 2 and 3 of the affidavit filed by the Under Secretary to the Government of Maharashtra are as follows :

"2. With reference to paragraph 1 of the said petition I say that the petitioner was detained under order, dated the 7th November, 1962 issued by the District Magistrate, Thana, under the Preventive Detention Act, 1950. On 10th November, 1962, the Government of Maharashtra revoked the order of detention, dated the 7th November, 1962 issued by the District Magistrate, Thana and the revocation order was served on the petitioner on the 11th November, 1962. Thereafter the petitioner was served with another order of detention, dated the 10th November, 1962 issued by the Government of Maharashtra under rule 30 of the Defence of India Rules, 1962. Further by its order, dated the 25th September, 1963, the Government of Maharashtra cancelled the said order of detention, dated the 10th November, 1962 and in pursuance of the said cancellation order the petitioner was released from detention on 27th September, 1963. After she actually came out of the Yeravda Central Prison gates and was a free woman, the fresh orders of detention and committal, dated the 25th September, 1963 issued by the Government of Maharashtra were served on her and she was again detained in the Yeravda Central Prison, Yeravda, Poona. Thereafter, by its order, dated the 3rd February, 1964, the Government of Maharashtra cancelled its order of detention, dated the 25th September, 1963 and the petitioner was again released on the 4th February, 1964. After she actually came out of the Arthur Road District Prison gates and was a free woman, she was served with a fresh order of detention, dated the 3rd February, 1964 issued by the Government of Maharashtra under rule 30 of the Defence of India Rules, 1962 and redetained with a view to prevent her from acting in a manner prejudicial to the defence of India, the public safety and maintenance of public order. The last two orders of cancellation and detention, dated the 3rd February, 1964 are attached to the said petition as Annexures A and B, respectively.

3. With reference to paragraph 2 of the said petition I say that what is stated, therein is generally correct. I further say that the petitioner is a Communist belonging to the Ranadive Group, which maintains that China has not committed any aggression on India and which actively propagates that view."

The High Court of Bombay held that the detention of the appellant from May, 1963 to February, 1964 was illegal but the order of detention passed on 3rd February, 1964 was legal, and accordingly the appellant could not be ordered to be released. It is this order of 3rd February, 1964, which is now the subject-matter of challenge.

Mr. Garg for the appellant raised the following points before us :

(1) That the State Government having delegated its powers conferred upon it under rule 30 of the Defence of India Rules, 1962, by Notification " Home Depart-

ment (Special) No S B III/D O R 1162-1, dated the 9th November, 1962" to all District Magistrates within the limits of their jurisdiction subject to the conditions mentioned in the Notification, the State Government was not competent to pass an order of detention under rule 30

(2) That the order of detention is bad because two Ministers cannot legally jointly pass an order of detention

(3) That the order of detention is vitiated by malice in law

(4) That on the facts of this case the High Court should have insisted on an affidavit being filed by the Ministers

(5) That there was no material to show that there was any apprehension that maintenance of public order would be prejudicially affected

Relying on *King Emperor v Sibnath Banerje*¹, Mr Garg argues that the State Government had divested itself of its powers to detain. The Privy Council observed at page 265 as follows

It is for the same reasons that their Lordships are unable to accept the respondents' content on also agreed to by the majority judges in the Federal Court that the provision of sub-section (5) of section 2 of the Defence of India Act provides the only means by which the Governor can relieve himself of a strictly personal function. Their Lordships would also add on this contention that sub-section (5) section 2 provides a means of delegation in the strict sense of the word namely, a transfer of the power or duty to the officer or authority defined in the sub-section, with a corresponding divestiture of the Governor of any responsibility in the matter, whereas under rule 49 sub-section (1) of the Act of 1935 the Governor remains responsible for the action of his subordinates taken in his name

We are unable to agree with Mr Garg that the Privy Council laid down that the Governor was divested of its power of passing an order when the above notification was issued. It seems to us that the Privy Council was thinking of and comparing the responsibility of the Governor for the orders passed by the delegate and by an officer acting under section 49 (1) of the Act of 1935. In the case of the delegate the Privy Council held that the Governor was not responsible, but that does not mean that the Governor could not have acted under rule 26 of the Defence of India Rules made under the Defence of India Act, 1939

In *Huth v Clarke*², Wills, J., observed at page 395

Delegation as the word is generally used does not imply a parting with powers by the person who grants the delegation but points rather to the conferring of an authority to do things which other wise that person would have to do himself

In our opinion by issuing the aforesaid notification the State Government has not denuded itself of the power to act under rule 30

Coming to the second point namely, whether the two Ministers can jointly pass an order of detention, it is necessary to give a few relevant facts. In *Godavari Shamrao Parulekar v State of Maharashtra*³, this Court observed

"The order therefore in the present case could only be made by a Minister who was incharge both of subjects allotted to the General Administration Department and subjects allotted to the Home Department (Special)

Basing on this passage, Mr Garg contends that it is only if a Minister is incharge of both the subjects that an order of detention can be passed. He further elaborates his point by saying that once one Minister is satisfied that it is necessary to detain a person under one head, say for the maintenance of public order, there is no question of another satisfaction by another Minister that it is necessary to detain that very person, say for the reason of preventing him from acting in a manner prejudicial to the defence of India. He says that as soon as the first Minister is satisfied that it is necessary to detain a person for reasons of maintenance of public order, no power remains to consider other reasons. We are unable to accept the above line of reasoning. We do not see any difficulty in two Ministers successively being satisfied that it is necessary to detain a person for different reasons, and then their decision

¹ (1945) 2 M L J 325, (1945) 72 I A 241

² (1890) 25 Q.B.D. 381

³ (1965) 2 S G J 523 (1965) M L J (Cri.) 765 (1964) 6 S.C.R. 446

being carried out by one order of detention duly authenticated. We agree with the High Court that this Court did not mean to lay down an absolute proposition of law that unless all the relevant subjects in respect of which the orders of detention are passed are concentrated in the hands of one Minister, valid orders of detention cannot be passed.

Regarding the next point, namely, whether the order of detention is vitiated by malice in law, Mr. Garg urges that no order of detention can be passed to defeat *habeas corpus* proceeding. We are unable to agree with the proposition submitted by the learned Counsel. This Court observed in *Naranjan Singh Nathawan v. The State of Punjab*¹, as follows :

"Once it is conceded that in *habeas corpus* proceedings the Court is to have regard to the legality or otherwise of the detention at the time of the return and not with reference to the date of the institution of the proceeding, it is difficult to hold, in the absence of proof of bad faith, that the detaining authority cannot supersede an earlier order of detention challenged as illegal and make a fresh order wherever possible which is free from defects and duly complies with the requirements of the law in that behalf."

This Court observed further at page 400, as follows :

"If at any time before the Court directs the release of the detenu, a valid order directing his detention is produced, the Court cannot direct his release merely on the ground that at some prior stage there was no valid cause for detention. The question is not whether the later order validates the earlier detention but whether in the face of the later order the Court can direct the release of the petitioner."

The mere fact that the detention order is passed during the pendency of *habeas corpus* proceedings cannot by itself lead to the conclusion that the order is vitiated by malice in law. It depends on the circumstances of the case. The detenu would have to prove not only that the detention order has been passed during the pendency of *habeas corpus* proceedings but also that there are other facts showing malice. Mr. Garg has not been able to point out any other facts in this case. If the Government considers an order of detention, which is the subject-matter of challenge, to be invalid, there is no reason why it should not pass a valid order. Mr. Garg says that there was no fresh consideration of the facts and the Ministers acted on pre-conceived notions and passed the new order dated 3rd February, 1964, without any fresh consideration. We are unable to accept this argument because it is quite clear from the affidavit filed by the Under Secretary to the Government of Maharashtra, Home Department and General Administration Department, that before the order was passed the Minister of Home and the Chief Minister were satisfied in accordance with the rules of business made under Article 166 of the Constitution.

We may at this stage deal with the question whether the High Court should have insisted on the Ministers filing the affidavit. It is for the High Court to consider in each case whether it is satisfied with the affidavit filed in the case. In this case it does not appear from the judgment of the High Court that this point was raised before the High Court.

The only point that remains is whether there was any material for detaining the appellant for the maintenance of public order. It has been consistently held by this Court that it is for the detaining authority to be satisfied whether on the material before it, it is necessary to detain a person under rule 30, and that this question is not justiciable. There is no force in this point.

Accordingly we hold that there is no infirmity in the order of detention dated 3rd February, 1964.

In Criminal Appeal No. 144 of 1964, the appellant P. P. Sanzgiri, adopted the arguments of Mr. Garg and further urged that he had been validly detained by order of the District Magistrate dated 11th November, 1962, and there had been no proper cancellation of this order. But he says that this order was bad because there was no confirmation of it. As pointed out above, we are not concerned with the

previous orders of detention because the appellant is detained now under the order dated 3rd February, 1964, and we need not go into the point

We may mention that in three appeals, Criminal Appeal No 225 of 1964, Criminal Appeal No 226 of 1964 and Criminal Appeal No 227 of 1964 the orders of detention are dated 14th February, 1964, but nothing turns on this difference in the dates of detention

In the result the appeals fail and are dismissed

V K

Appeals dismissed

THE SUPREME COURT OF INDIA

(Criminal Appellate Jurisdiction)

PRESENT — J C SHAH, K N WANCHOO AND S M SIKRI, JJ

Mrs Veeda Menezes

*Appellant**

v

Yusuf Khan Haji Ibrahim Khan and another

Respondents

Penal Code (XLV of 1860) section 95—Applicable—Harm—If excludes physical injury

It is true that the object of framing section 95 of the Penal Code was to exclude from the operation of the Penal Code those cases which from the imperfectness of language may fall within the letter of the law but are not within its spirit and considered and for the most part dealt with by the courts as innocent. It cannot however be said that harm caused by doing an act with intent to cause harm or with the knowledge that harm may be caused thereby will not fall within the terms of section 95. The section applies if the act causes harm or is intended to cause harm or is known to be likely to cause harm provided the harm is so slight that no person of ordinary sense and temper would complain of such harm. The expression harm in section 95 includes physical injury. Whether an act which amounts to an offence is trivial would depend undoubtedly upon the nature of the injury, the position of the parties, the knowledge or intention with which the offending act was done and other related circumstances.

Appeal by Special Leave from the Judgment and Order, dated the 31st January, 1964, of the Bombay High Court in Criminal Revision Application No 913 of 1963

I C Dalal, E E Jhirad and O P Rana Advocates for Appellant

S G Patwardhan Senior Advocate (B Dutta, Advocate, and J B Dadachyani; O C Mathur and Ravinder Narain, Advocates of Mrs J B Dadachyani & Co with him), for Respondent No 1

The Judgment of the Court was delivered by

Shah, J—The appellant Mrs Menezes is the owner of a house in Bombay, and the wife of the first respondent Yusuf Khan is a tenant of a part of the first floor in that house. On 17th January, 1963, one Robert—a servant of the appellant, called the wife of the first respondent a thief and ‘*Halkat*’. On the next day the first respondent slapped the face of Robert. This was followed by a heated exchange of abusive words between the first respondent and the appellant’s husband. The first respondent was annoyed and threw at the appellant’s husband a file of papers. The file did not hit the appellant’s husband but it hit the elbow of the appellant causing a scratch. The appellant lodged information at the Bandra Police Station complaining that the first respondent had committed house trespass in order to the committing of an offence punishable with imprisonment, had thrown a shoe at her, had slapped the face of her servant Robert, and had also caused her a bleeding incised wound on the forearm. The version of the appellant was a gross exaggeration of the incident. The Officer in-charge of the Police Station was persuaded to enter upon an investigation on this information, which by charging the respondent with the offence of trespass was made to appear as if a cognizable offence was committed. The Sub Inspector found that the appellant had suffered a mere scratch on her elbow. The appellant and Robert declined to go to a public

ospital for examination or treatment, and were, it is claimed, examined by a private medical practitioner, who certified that the appellant had suffered a 'bleeding incised wound, skin deep, size 1" in length on the right forearm', and that Robert had 'a swelling about 1½" in diameter, roundish, soft and tender,' but no bruises.

The offence was petty, but was given undue importance. The case was transferred from the Court of the Presidency Magistrate, Bandra, to the Court of the residency Magistrate, VI Court, Mazagzon, Bombay, and was entrusted to a special Prosecutor on behalf of the State. The Trial Magistrate held that the story that the first respondent had trespassed into the house of the appellant was false and the charge of trespass was made only with a view to persuade the Police Officer to investigate it as a cognizable offence. The story of the appellant that the first respondent had hurled a shoe at her was also disbelieved. The Trial Magistrate held that simple injuries were caused to Robert and to the appellant and for causing those injuries he convicted the first respondent of the offence under section 323, Indian Penal Code and sentenced him to pay a fine of Rs. 10 on each of the two counts. Against the order of conviction, a revisional application was preferred to the High Court of Judicature at Bombay. The appellant was no longer concerned with the proceedings in the High Court, but since there were some negotiations for compounding the offence, the appellant was impleaded as a party to the proceeding before the High Court. The High Court was of the view that the appellant had grossly exaggerated her story that the evidence of the medical practitioner who claimed to have examined the appellant and Robert and to have 'certified the injuries' did 'not inspire confidence,' that the husband of the appellant had addressed provocative and insulting abuses, and that in a state of excitement the respondent hurled a 'file of papers' at the appellant's husband which missed him and caused a 'scratch' on the appellant's forearm. The injuries caused to the appellant and to Robert were in the view of the High Court 'trivial' and the case was one in which the injury intended to be caused was so slight that a person of ordinary sense and temper would not complain of the harm caused thereby. The High Court accordingly set aside the conviction and acquitted the first respondent.

Before us it was urged that the High Court had no power to act under section 55, Indian Penal Code, since by the act of the respondent bodily hurt was intentionally caused. It was argued that section 95 applies only in those cases where the act which causes harm is accidental and not deliberate, and that the expression 'harm' in section 95, Indian Penal Code includes financial loss, loss of reputation, mental worry or even apprehension of injury, but when physical injury is actually caused the complainant section 95 cannot be invoked. In our view there is no substance in these contentions. Section 95 provides :

" Nothing is an offence by reason that it causes, or that it is intended to cause, or that it is known to be likely to cause, any harm, if that harm is so slight that no person of ordinary sense and temper would complain of such harm."

It is true that the object of framing section 95 was to exclude from the operation of the Penal Code those cases which from the imperfection of language may fall within the letter of the law, but are not within its spirit and are considered, and for the most part dealt with by the Courts, as innocent. It cannot however be said that harm caused by doing an act with intent to cause harm or with the knowledge that harm may be caused thereby, will not fall within the terms of section 95. The argument is belied by the plain terms of section 95. The section applies if the act causes harm or is intended to cause harm or is known to be likely to cause harm, provided the harm is so slight that no person of ordinary sense and temper would complain of such harm.

The expression 'harm' has not been defined in the Indian Penal Code; in its dictionary meaning it connotes hurt; injury; damage; impairment; moral wrong or evil. There is no warrant for the contention raised that the expression "harm" in section 95 does not include physical injury. The expression 'harm'

is used in many sections of the Indian Penal Code. In sections 81, 87, 88, 89, 91, 92, 100, 104 and 106 the expression can only mean physical injury. In section 93 it means an injurious mental reaction. In section 415 it means injury to a person in body, mind, reputation or property. In sections 469 and 499 harm it is plain from the context is to the reputation of the aggrieved party. There is nothing in section 95 which warrants a restricted meaning which Counsel for the appellant contends should be attributed to that word. Section 95 is a general exception, and if that expression has in many other sections dealing with general exceptions a wide connotation as inclusive of physical injury, there is no reason to suppose that the Legislature intended to use the expression "harm" in section 95 in a restricted sense.

The next question is whether, having regard to the circumstances, the harm caused to the appellant and to her servant Robert was so slight that no person of ordinary sense and temper would complain of such harm. Section 95 is intended to prevent penalisation of negligible wrongs or of offences of trivial character. Whether an act which amounts to an offence is trivial would undoubtedly depend upon the nature of the injury, the position of the parties, the knowledge or intention with which the offending act is done, and other related circumstances. There can be no absolute standard or degree of harm which may be regarded as so slight that a person of ordinary sense and temper would not complain of the harm. It cannot be judged solely by the measure of physical or other injury the act causes. A soldier assaulting his colonel, a policeman assaulting his Superintendent, or a pupil beating his teacher, commit offences, the heinousness of which cannot be determined merely by the actual injury suffered by the officer or the teacher for the assault would be wholly subversive of discipline. An assault by one child on another, or even by a grown up person on another, which causes injury may still be regarded as so slight, having regard to the way and station of life of the parties, relation between them, situation in which the parties are placed, and other circumstances in which harm is caused, that the victim ordinarily may not complain of the harm.

The complainant's husband had, it appears, beaten the first respondent's child for some rude behaviour and Robert the appellant's servant was undoubtedly rude to the respondent's wife and instead of showing contrition he said that he would repeat his rude words. At the time of the incident in question, the appellant's husband and the first respondent exchanged vulgar abuses. Apparently the respondent was annoyed and threw a 'file' of papers which caused a mere scratch to the appellant. It is true that the servant Robert was given a slap on the face by the first respondent. But the High Court was of the view that the harm caused both to the appellant and to Robert was 'trivial,' and that the evidence justified the conclusion that the injury was so slight that a person of ordinary sense and temper placed in the circumstances in which the appellant and Robert were placed may not reasonably have complained for that harm. Even granting that a different view may be taken of the evidence, we do not think that we would be justified in an appeal under Article 136 of the Constitution in disagreeing with the order of the High Court.

We therefore maintain the order of acquittal passed by the High Court. This Court had at the time when Special Leave was granted directed that Rs 1,500 be deposited by the appellant by way of costs of the respondents. The State of Maharashtra has not appeared before us in this appeal. In the circumstances, we direct that Rs 750 be paid to the first respondent and the balance be returned to the appellant.

K S

Appeal dismissed

THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT :—K. SUBBA RAO AND V. RAMASWAMI, JJ.

The State of Gujarat

.. Appellant*

v.

Jaganbhai Bhagwanbhai

.. Respondent.

Bombay Prevention of Gambling Act (IV of 1887), section 7—"Instruments of Gaming"—Proof—If requires expert evidence—Evidence of Police Officer who made the search that articles seized were "instruments of gaming"—If requires corroboration by Expert's evidence in every case.

There is nothing in the Bombay Prevention of Gambling Act to suggest that in order to prove that the articles seized are "instruments of gaming" it is the duty of the prosecution to examine an expert in every case. It is open to the prosecution to prove that articles seized are instruments of gaming by proper evidence and it is not necessary to examine an expert for the purpose in each and every case. It is also not proper to make a distinction between the evidence of an officer who makes a complaint under the proviso to section 6 of the Act and to whom a warrant is issued for search and the evidence of a person to whom a warrant is issued but who makes no such complaint under the proviso. The question whether the evidence of the person who executes the warrant requires corroboration depends on the facts and circumstances of each case and no legal distinction can be made merely because the person who executes the warrant happens to be the person who makes the complaint under the proviso to section 6 of the Act to the Commissioner of Police or the Magistrate.

Appeal from the Judgment and Order, dated the 4th November, 1963 of the Gujarat High Court in Criminal Appeal No. 734 of 1962.

S. G. Patwardhan, Senior Advocate (R. N. Sachthey and B. R. G. K. Achar, Advocates with him), for Appellant.

The Judgment of the Court was delivered by

Ramaswami, J.—This appeal is brought by the State of Gujarat against the judgment of the High Court of Gujarat at Ahmedabad dated 4th November, 1963 in Criminal Appeal No. 734 of 1962.

The respondent was charged in the Court of the Judicial Magistrate, First Class, Bulsar under sections 4 and 5 of the Bombay Prevention of Gambling Act, 1887 (Bombay Act IV of 1887), hereinafter called the 'Act'. The case of the prosecution was that on 31st January, 1962 at about 9 p.m. the respondent was found accepting bets on American futures. On being searched in the presence of panchas currency notes of Rs. 119 and two slips on which American futures were recorded were found. The trying Magistrate, however, held that slips were not "instruments of gaming" within the meaning of section 7 of the Act. The Magistrate was also not satisfied that the Police Officer who carried out the search and seized the articles had reasonable grounds to believe that the slips and other articles recovered from the respondent were instruments of gaming. The Magistrate held that the presumption under section 7 of the Act could not be raised. The respondent was, therefore, acquitted of the charge. Against the order of acquittal the State of Gujarat preferred an appeal to the High Court of Gujarat at Ahmedabad in Criminal Appeal No. 734 of 1962. The appeal was dismissed by Raju, J., on 4th November, 1963.

In support of this appeal Mr. Patwardhan submitted that the High Court was in error in holding that it is necessary to examine an expert to corroborate the evidence of the Prosecuting Sub-Inspector that the articles seized were "instruments of gaming". It was also contended by Counsel that the High Court was not right in taking the view that the evidence of the Police Inspector to whom the warrant was issued under section 6 of the Act required corroboration in each and every case. In our opinion, both the contentions of Mr. Patwardhan are well founded and must be accepted as correct.

16th February, 1966.

Section 3 of the Act defines the expression "instruments of gaming" as including any article used or intended to be used as a subject or means of gaming, any documents used or intended to be used as a register or record or evidence of any gaming, the proceeds of any gaming, and any winnings or prizes in money or otherwise distributed or intended to be distributed in respect of any gaming. Section 6 provides for entry and search by Police Officers in gaming houses. Section 6 (1) states

"6 (1) It shall be lawful for a Police Officer—

(i) in any area for which a Commissioner of Police has been appointed not below the rank of a Sub-Inspector and either empowered by a general order in writing or authorized in each case by special warrant issued by the Commissioner of Police, and

(ii) elsewhere not below the rank of a Sub-Inspector of Police authorised by special warrant issued in each case by a District Magistrate or Sub-Divisional Magistrate or by a Taluka Magistrate specially empowered by the State Government in this behalf or by a Superintendent of Police or by an Assistant or Deputy Superintendent of Police especially empowered by the State Government in this behalf, and

(iii) without prejudice to the provision in clause (ii) above, in such other area as the State Government may, by notification in the Official Gazette, specify in this behalf, not below the rank of a Sub-Inspector and empowered by general order in writing issued by the District Magistrate

(a) to enter, with the assistance of such persons as may be found necessary, by night or by day, and by force, if necessary, any house, room or place which he has reason to suspect is used as a common gaming house

(b) to search all parts of the house, room or place which he shall have so entered when he shall have reason to suspect that any instruments of gaming are concealed therein, and also the persons whom he shall find therein whether such persons are then actually gaming or not,

(c) to take into custody and bring before a Magistrate all such persons,

(d) to seize all things which are reasonably suspected to have been used or intended to be used for the purpose of gaming, and which are found therein

* * * * *

Section 7 of the Act relates to presumptive proof of keeping or gaming in common gaming house. Section 7 provides as follows.

"7 When any instrument of gaming has been seized in any house, room or place entered under section 6 or about the person of any one found therein and in the case of any other thing so seized if the Court is satisfied that the police officer who entered such house, room or place had reasonable grounds for suspecting that the thing so seized was an instrument of gaming, the seizure of such instrument or thing shall be evidence, until the contrary is proved, that such house, room or place is used as a common gaming house and the persons found therein were then present for the purpose of gaming although no gaming was actually seen by the Magistrate or the Police officer or by any person acting under the authority of either of them

* * * * *

There is nothing in the Act to suggest that in order to prove that the articles seized are "instruments of gaming" it is the duty of the prosecution to examine an expert in every case. It is open to the prosecution to prove that the articles seized are instruments of gaming by proper evidence and it is not necessary to examine an expert for the purpose in each and every case. It is also not proper to make a distinction between the evidence of an officer who makes a complaint under the proviso to section 6 of the Act and to whom a warrant is issued for search and the evidence of a person to whom a warrant is issued but who makes no such complaint under the proviso. The question as to whether the evidence of the person who executes the warrant requires corroboration depends on the facts and circumstances of each case and no legal distinction can be made merely because the person who executes the warrant happens to be the person who makes the complaint under the proviso to section 6 of the Act to the Commissioner of Police or to the Magistrate.

We do not, however, propose to interfere with the order of acquittal in this case, because the offence is petty and the offence was committed several years back. We accordingly dismiss the appeal.

K.S.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Original Jurisdiction.)

PRESENT :—P. B. GAJENDRADGADKAR, *Chief Justice*, K. N. WANCHOO, M. HIDAYATULLAH, J. C. SHAH AND S. M. SIKRI, JJ.

G. Sadanandan

.. *Petitioner**

v.

The State of Kerala and another

.. *Respondents.*

Defence of India Rules (1963), Rule 30 (4)—Detention under—Detention order made casually without subjective satisfaction of Authority—Liability to be set aside.

After all the detention of a citizen in every case is the result of the subjective satisfaction of the appropriate authority, and so, if a *prima facie* case is made by the detenu in his petition under Article 32 that his detention is either *mala fide* or is the result of the casual approach, adopted by the appropriate authority, the appropriate authority should place before the Court sufficient material in the form of proper affidavit made by a duly authorised person to show that the allegations made by the petitioner about the casual character of the decision or its *mala fides*, are not well founded. On failure of the authority to place such materials before the Court the order of detention and continued detention of the petitioner are totally invalid and unjustified. Even during the Emergency the freedom of Indian citizens cannot be taken away without the existence of the justifying necessity specified by the Defence of India Rules themselves.

Petition under Article 32 of the Constitution of India for the enforcement of Fundamental rights.

M. K. Ramamurthi, S. C. Agarwal, R. K. Garg and D. P. Singh, Advocates of *M/s. Ramamurthi & Co.*, for Petitioner.

Niren De, Additional Solicitor-General of India, (*A. G. Pudissery and M. R. Krishna Pillai*, Advocates, with him), for Respondents.

The Judgment of the Court was delivered by

Gajendragadkar, C.J.—This petition was heard on the 11th February, 1966; and at the close of the hearing, we allowed the petition and directed that the petitioner should be released forthwith and indicated that our reasons would be pronounced later. Accordingly, our present judgment gives our reasons for the order which has already been posed by us.

The petitioner, G. Sadanandan, has been detained by respondent No. 1, the State of Kerala under Rule 30 (1) (b) of the Defence of India Rules, 1962 (hereinafter called "the Rules") by an order passed by it on the 20th October, 1965. The said order recites that from the materials placed before respondent No. 1 it was satisfied that with a view to prevent the petitioner from acting in a manner prejudicial to the maintenance of supplies and services essential to the life of the community, it was necessary to detain him. The said order further shows that under rule 30 (4) of the Rules, respondent No. 1 had decided that the petitioner be detained in the Central Prison, Trivandrum, under conditions as to maintenance, discipline and punishment of offences and breaches of discipline as provided in the Travancore-Cochin Security Prisoners Order, 1950. The petitioner challenges the validity of this order by his present petition filed under Article 32 of the Constitution.

The petitioner is a businessman who carries on wholesale business in kerosene oil as ESSO dealer and in provisions in his places of business at Trivandrum. In connection with his wholesale business of selling kerosene oil, the petitioner receives the kerosene oil either in bulk or in sealed tins from the ESSO company. When the kerosene oil is thus received by him, the petitioner transfers the kerosene oil from barrels into empty tins purchased from the market and sells them to his customers. Until the Kerala Kerosene Control Order, 1965 was promulgated, and brought into force on the 24th October, 1965, the petitioner was not required to take a licence

for carrying on his business in kerosene oil. As from the 24th October, 1965 the said trade could not be carried on in Kerala without obtaining a licence. It is common ground that the petitioner has not been granted a licence in that behalf. To his present petition, the petitioner has joined respondent No. 1 and N. Paramasivan Nair, Deputy Superintendent of Police (Civil) Supplies Cell, Crime Branch, Trivandrum, as respondent No. 2.

The petitioner alleges that respondent No. 2 caused to be initiated criminal proceedings against him in Criminal Case No. 70 of 1965 in the Court of the District Magistrate, Trivandrum. These proceedings were commenced on the 20th May, 1965. The charge against the petitioner set out in the First Information Report was that the petitioner had exhibited a board showing stock "nil" on the 20th May, 1965, at about 7 00 P.M. in his wholesale shop at Chalai, Trivandrum when, in fact, there was stock available in his shop. The Police searched the shop that day in the presence of respondent No. 2, though in the relevant papers prepared in regard to the said search, no reference was made to his presence. According to the petitioner, the board indicating 'nil' stock had been exhibited in his shop, because 7 tins out of the available stock had been sold to one D.N. Siktar in regard to which a sale memo was being prepared when the raid took place, whereas the two remaining tins were in a damaged condition and could not have been sold. Even so, the raid was carried out and F.I.R. was lodged against the petitioner alleging that he had committed an offence by violating Rule 125 (2) and (3) of the Rules read with clause 4 of the Kerosene (Price Control) Order, 1963.

The petitioner appeared before the District Magistrate before whom the F.I.R. had been filed, and was released by him on bail. In this case, all the witnesses for the prosecution had been examined, except the officer who had submitted the charge-sheet. Except the Sub-Inspector of Police (P.W. 1), and the Head Constable (P.W. 2) no other witness supported the prosecution case, though in all five witnesses were examined for the prosecution.

Pending the trial of this case, the Inspector of Police, Crime Branch (Food), Trivandrum, who is a subordinate of respondent No. 2, initiated another case at his instance, being Case No. 332 of 1965 before the District Magistrate, Trivandrum, on the 29th September, 1965. In this case, it was alleged that the petitioner had violated Rule 125 (A) of the rules read with rules 3 and 4 of the Kerosene (Price Control) Order, 1963 as well as had committed an offence under section 420, Indian Penal Code. The F.I.R. in regard to this case was made by Narayan Pillai Sivasankaran Nair of Tampanoor, Trivandrum. This Nair is a salesman in his elder brother's provision store at Trivandrum, and both these brothers are close relatives of respondent No. 2. This case was initiated after the search of the petitioner's shop at Chalai. The petitioner was then arrested and brought before the District Magistrate on the 20th September, 1965. On this occasion also, when the petitioner's shop was re-searched, respondent No. 2 was present. During the course of the search, the police seized one tin weighing 16 200 kgs. None of the other 899 tins which were stored in the two rooms of the place of sale of the petitioner, were seized. The police party also searched the godown of the petitioner and took into custody 632 tins of kerosene oil. Six barrels of oil were likewise seized. According to the petitioner, all this was done at the instance of N. Sivasankaran Nair who is a close relative of respondent No. 2 and who had purchased two tins of kerosene oil from the petitioner which were produced before the police officers for the purpose of showing that the tins were short of contents.

The petitioner was granted interim bail on the 30th September, 1965 by the District Magistrate, and finally released on bail on the execution of a bail bond on the 21st October, 1965. When the order of bail was made absolute by the District Magistrate, the Assistant Public Prosecutor did not oppose the release of the petitioner on bail. The petitioner contends that though the case was posted several times for the submission of the final report by the prosecution, respondent No. 2 has so managed that the said final report has not been submitted till the date of the present petition.

After the petitioner was released by the District Magistrate on the 21st October, 1965, he reached home at 4 o'clock in the evening. Immediately thereafter, respondent No. 2 came in a jeep to the petitioner's residence and took him into custody. When the petitioner asked respondent No. 2 as to why he was being arrested, he refused to disclose the grounds. Respondent No. 2 took the petitioner into custody by force and carried him to jail.

The petitioner's wife thereafter instructed a lawyer to contact the petitioner who in turn tried to get in touch with the petitioner at Wanchiyoore Police Station, but did not succeed. Under these circumstances, the petitioner's wife instructed her Advocate to file a writ petition in the Kerala High Court for the production of the petitioner. Accordingly, a writ petition was filed on the 22nd October, 1965.

Later, the Advocate engaged by the petitioner's wife was able to get in touch with the petitioner with the permission of the Home Secretary in the Central Jail at Trivandrum. At this interview, the Advocate was given the detention order which had been served on the petitioner, and instructed to take suitable action to challenge the said order. In view of the fact that the petition filed by the Advocate in the Kerala High Court under the vague instructions of the petitioner's wife contained a very limited prayer, the petitioner's Advocate withdrew the said petition on the 27th October, 1965. Ultimately, the present petition has been filed in this Court on behalf of the petitioner on the 20th November, 1965. That, in brief, is the background of the present writ petition.

The petitioner challenges the validity of the impugned order of detention mainly on the ground that it is *mala fide*, and has been passed as a result of the malicious and false reports which have been prepared at the instance of respondent No. 2. The whole object of respondent No. 2, according to the petitioner, in securing the preparation of these false reports is to eliminate the petitioner from the field of wholesale business in kerosene oil in Trivandrum, so that his relatives may benefit and obtain the dealership of the ESSO company. The petitioner further alleges that the order of detention has been passed solely with the purpose of denying him the benefit of the order of bail which was passed in his favour by the District Magistrate on the 21st October, 1965. In support of the plea that his detention is *mala fide*, the petitioner strongly relies on the fact that on the 24th October, 1965, the Kerala Kerosene Control Order, 1965 had come into force and in consequence unless the petitioner gets a licence, it would be impossible for him to carry on his business of kerosene oil; and yet, the detention order ostensibly passed against him as a result of his activities alleged to be prejudicial in respect of his business in kerosene oil, continues to be enforced against him even after the Control Order has been brought into operation. It is mainly on these grounds that the petitioner challenges the validity of the impugned order of his detention.

The allegations made in the petition have been controverted by Mr. Devassy who is the Secretary in the Home Department of respondent No. 1. In his counter-affidavit, the Home Secretary has, in a general way denied all the allegations made in the petition. The purport of the counter-affidavit filed by the Home Secretary is that the impugned order of detention has been passed by respondent No. 1 *bona fide* and after full consideration of the merits of the case. Respondent No. 1 was satisfied, says the counter-affidavit, that the activity of the petitioner was likely to prejudice supplies essential to the life of the community as a whole; and so, the petitioner's contention that the impugned order is *mala fide* is controverted.

In dealing with writ petitions by which orders of detention passed by the appropriate authorities under Rule 30 (1) (b) of the Rules are challenged, this Court has consistently recognised the limited scope of the enquiry which is judicially permissible. Whether or not the detention of a detenu is justified on the merits, is not open to judicial scrutiny; that is a matter left by the Rules to the subjective satisfaction of the appropriate authorities empowered to pass orders under the relevant rule. This Court, no doubt, realises in dealing with pleas for *habeas corpus* in such proceedings that citizens are detained under the Rules without a trial, and that clearly is

inconsistent with the normal concept of the Rule of Law in a democratic State. But having regard to the fact that an Emergency has been proclaimed under Article 352 of the Constitution, certain consequences follow, and one of these consequences is that the citizens detained under the Rules are precluded from challenging the validity of the Rules on the ground that their detention contravenes their Fundamental Rights guaranteed by Articles 19, 20 and 21. The presence of the Proclamation of Emergency and the notification subsequently issued by the President constitute a bar against judicial scrutiny in respect of the alleged violation of the Fundamental Rights of the detenu. This position has always been recognised by this Court in dealing with such writ petitions.

Nevertheless, this Court naturally examines the detention orders carefully and allows full scope to the detenus to urge such statutory safeguards as are permissible under the Rules and it has been repeatedly observed by this Court that in case where this Court is satisfied that the impugned orders suffer from serious infirmities on grounds which it is permissible for the detenus to urge, the said orders would be set aside. Subject to this position the merits of the orders of detention are not open to judicial scrutiny. That is why pleas made by the detenus that the impugned orders have been passed by the appropriate authorities without applying their minds properly to the allegations on which the impugned orders purport to be based or that they have been passed *mala fide* do not usually succeed because this Court finds that the allegations made by the detenus are either not well founded or have been made in a casual and light hearted manner. But cases do come before this Court, though not frequently where this Court comes to the conclusion that the impugned order of detention is passed without the appropriate authority applying its mind to the problem or that it can well be regarded as an order passed *mala fide*. Having heard Mr Ramamurthi for the petitioner and the learned Additional Solicitor-General for respondent No. 1 we have come to the conclusion that the impugned order in the present case must be characterised as having been passed *mala fide*.

The first consideration which has weighed in our minds in dealing with Mr Ramamurthi's contentions in the present proceedings is that respondent No. 2 has not chosen to make a counter affidavit denying the several specific allegations made against him by the petitioner. Broadly stated, the petition alleges that respondent No. 2 is responsible for the criminal complaints made against the petitioner, that respondent No. 2 was present when his premises were searched and that respondent No. 2 actually went to the house of the petitioner when the petitioner was forcibly taken into custody and removed to the jail. The petition further alleges that the second criminal complaint filed against the petitioner was the direct result of the F.I.R. by Narayana Pillai Sivasankaran Nair who and his brother are the trade rivals of the petitioner and are closely related to respondent No. 2. The petition likewise specifically alleges that the reports on which the impugned order of detention has been passed, were the result of the instigation of respondent No. 2. Whether or not these allegations, if proved, would necessarily make the impugned order *mala fide*, is another matter, but, for the present, we are dealing with the point that respondent No. 2 who has been impleaded to the present proceedings and against whom specific and clear allegations have been made in the petition, has not chosen to deny them on oath. In our opinion, the failure of respondent No. 2 to deny these serious allegations constitutes a serious infirmity in the case of respondent No. 1.

The significance of this infirmity is heightened when we look at the counter affidavit filed by the Home Secretary. This affidavit has not been made in a proper form. The deponent does not say which of the statements made by him in his affidavit are based on his personal knowledge and which are the result of the information received by him from documents or otherwise. The form in which the affidavit has been made is so irregular that the learned Additional Solicitor-General fairly conceded that the affidavit could be ignored on that ground alone. That, however, is not the only infirmity in this affidavit.

It is surprising that the Home Secretary should have taken upon himself to deny the allegations made by the petitioner against respondent No. 2 when it is plain

that his denial is based on hearsay evidence at the best. It is not easy for us to appreciate why the Home Secretary should have undertaken the task of refuting serious allegations made by the petitioner against respondent No. 2 instead of requiring respondent No. 2 to make a specific denial on his own. Whether or not Narayan Pullai Sivasankaran Nair and his brother are close relatives of respondent No. 2 and whether or not they are the trade rivals of the petitioner and expect to receive benefit from his detention, are matters on which the Home Secretary should have wisely refrained from making any statement in his affidavit. He should have left it to respondent No. 2 to make the necessary averments. Besides it is impossible to understand why the specific allegations made by the petitioner against respondent No. 2 in regard to the part played by him either in searching the petitioner's shop or in arresting him should not have been definitely denied by respondent No. 2 himself. The statements made by the Home Secretary in his affidavit in that behalf are very vague and unsatisfactory. We have carefully considered the affidavit made by the Home Secretary and we are satisfied that apart from the formal defect from which it plainly suffers, even otherwise the statements made in the affidavit do not appear to us to have been made by the deponent after due deliberation.

Take, for instance, the statements made by the Home Secretary in regard to the petitioner's contention that the continuance of his detention after the Kerala Kerosene Control Order, 1965 came into operation on the 24th October, 1965, is wholly unjustified. The petitioner's grievance is clear and unambiguous. He says that unless a licence is granted to him, he would no longer be able to trade in kerosene oil; and since admittedly, no licence has been granted to him, his continued detention on the ostensible ground that his dealings in kerosene oil amount to a prejudicial activity is entirely unjustified. Now, what does the Home Secretary say in respect of this contention? On the date of the detention of the petitioner, says the Home Secretary's affidavit, the Control Order had not come into force, and that, no doubt, is true. But the question is: is the continuance of the petitioner's detention justified after the said Order came into force? The affidavit says that the petitioner is not a licensee under the Kerala Kerosene Control Order, 1965, and cannot legally carry on the business as a dealer in kerosene at present; but there is nothing under the law preventing him from applying for such licence to carry on the same business. It is difficult to understand the logic or the reasonableness of this averment. Indeed, we ought to add that the learned Additional Solicitor-General fairly, and we think rightly and wisely, conceded that this part of the Home Secretary's affidavit could not be supported and that he saw no justification for the continuance of the petitioner's detention after the Kerala Kerosene Control Order came into operation on the 24th October, 1965. It is remarkable that in the whole of his affidavit, the Home Secretary does not say how he came to know all the facts to which he has purported to depose in his affidavit. We have, however, assumed that as Home Secretary, the file relating to the detention of the petitioner must have been handled by him, though the Home Secretary should have realised that he should himself have made a statement to that effect in his affidavit. We have had occasion to criticise affidavits made by appropriate authorities in support of the detention orders in writ proceedings, but we have not come across an affidavit which shows such an amount of casualness as the present case. We have carefully examined all the material and relevant facts to which our attention has been drawn in the present proceedings and we see no escape from the conclusion that the impugned order of detention passed against the petitioner on the 20th October, 1965 and more particularly, the petitioner's continued detention after the 24th October, 1965 must be characterised as clearly and plainly *mala fide*. This is a case in which the powers conferred on the appropriate authority have, in our opinion, been abused.

We are conscious that even if a subordinate officer makes a malicious report against a citizen suggesting that he should be detained, the malice inspiring the report may not necessarily or always make the ultimate order of detention passed by the appropriate authority invalid. Even a malicious report may be true in the sense that the facts alleged may be true, but the person making the report was determined to report those facts out of malice against the party concerned. But a

malicious report may also be false. In either case the malice attributable to the reporting authority cannot in law, be attributed to the detaining authority, but in such cases, it must appear that the detaining authority carefully examined the report and considered all the relevant material available in the case before passing the order of detention. Unfortunately, in the present case, the affidavit made by the Home Secretary is so defective and in many places so vague and ambiguous that we do not know which authority acting for respondent No. 1 in fact examined the case against the petitioner and what was the nature of the material placed before such authority, and the affidavit does not contain any averment that after the material was examined by the appropriate authority, the appropriate authority reached the conclusion that it was satisfied that the petitioner should be detained with a view to prevent him from acting in a manner prejudicial to the maintenance of supplies and services essential to the life of the community.

After all the detention of a citizen in every case is the result of the subjective satisfaction of the appropriate authority and so, if a *prima facie* case is made by the petitioner that his detention is either *mala fide*, or is the result of the casual approach adopted by the appropriate authority, the appropriate authority should place before the Court sufficient material in the form of proper affidavit made by a duly authorised person to show that the allegations made by the petitioner about the casual character of the decision or its *mala fides*, are not well founded. The failure of respondent No. 1 to place any such material before us in the present proceedings leaves us no alternative but to accept the plea made by the petitioner that the order of detention passed against him on the 20th October, 1965, and more particularly, his continued detention after the 24th October, 1965, are totally invalid and unjustified.

In conclusion we wish to add that when we come across orders of this kind by which citizens are deprived of their fundamental right of liberty without a trial on the ground that the emergency proclaimed by the President in 1962 still continues and the powers conferred on the appropriate authorities by the Defence of India Rules justify the deprivation of such liberty we feel rudely disturbed by the thought that continuous exercise of the very wide powers conferred by the Rules on the several authorities is likely to make the conscience of the said authorities insensitive if not blunt to the paramount requirement of the Constitution that even during Emergency the freedom of Indian citizens cannot be taken away without the existence of the justifying necessity specified by the Rules themselves. The tendency to treat these matters in a somewhat casual and cavalier manner which may conceivably result from the continuous use of such unfettered powers may ultimately pose a serious threat to the basic values on which the democratic way of life in this country is founded. It is true that cases of this kind are rare, but even the presence of such rare cases constitutes a warning to which we think it is our duty to invite the attention of the appropriate authorities. In the circumstances of this case we direct that respondent No. 1 will pay the costs of the petitioner quantified at Rs. 500.

K.S.

Petition allowed

THE SUPREME COURT OF INDIA.

PRESENT :—K. SUBBA RAO AND V. RAMASWAMI, JJ.

M/s., Ram Chand & Sons Sugar Mills, Private, Ltd., Bara-banki (U.P.)

.. Appellants*

v.

Kanhayalal Bhargava and others

.. Respondents.

Civil Procedure Code (V of 1908), section 151 and Order 29, rules 1 to 3—Company—Suit against—Written statement signed by A a director—Order by Court directing director J. K. to appear in Court to answer material questions—J. K. pleading illness and evading appearance—Number of adjournments granted—Company expressing its inability to compel J. K.—Defence struck off under inherent powers—Propriety.

In a suit against a company and another for recovery of a certain sum—and it was contested by the company, the Court on the application of the plaintiff (respondent) ordered the appearance in Court of the Jugal Kishore a director of the company, for the purpose of answering some material questions. The said director pleaded illness and the Court gave a number of adjournments to enable the company to produce him. At last the company represented it was powerless to compel him to appear. The Court thereupon struck off the defence of the company. On appeal, the High Court of Punjab (Circuit Bench) at Delhi held that the company could not be heard to say that one of the directors, did not obey the Court and dismissed the appeal. Hence the instant appeal by Special Leave.

Held, the inherent power of a Court is in addition to and complementary to the powers expressly conferred under the Code. But that power will not be exercised if its exercise is inconsistent with, or comes into conflict with, any of the powers expressly or by necessary implication conferred by the other provisions of the Code. If there are express provisions exhaustively covering a particular topic, they give rise to a necessary implication that no power shall be exercised in respect of the said topic other than in the manner prescribed by the said provisions. Whatever limitations are imposed by construction on the provisions of section 151 of the Code, they do not control the undoubted power of the Court conferred under section 151 of the Code to make a suitable order to prevent the abuse of the process of the Court.

'Any director' in rule 3 need not be the same director who has signed and verified a pleading or on whom summons has been served. He can be any one of the directors who will be in a position to answer material questions relating to the suit. The adjective 'any' indicates that any one of the directors with the requisite qualifications prescribed by rules 1, 2 and 3 can perform the function laid down in each of the rules. The contention that it is only the director mentioned, in rule 1, that can be ordered to appear under rule 3 is not sound.

There is nothing in Order 29 of the Code, which expressly or by necessary implication, precludes the exercise of the inherent power of the Court under section 151 of the Code.

A company and the director of the company are different legal personalities. The acts of directors within the powers conferred by the Memorandum of association may be binding on the company, but their acts outside the said powers do not bind the company.

It is not possible to hold that the director Jugal Kishore, in refusing to respond to the notice given by the Court was acting within the scope of the powers conferred on him. There is no finding that the company was guilty of abuse of the process of the Court by preventing that director from attending Court; if it had been so found the Court would have been justified in striking off the defence.

The orders of the Court below are not correct.

Appeal by Special Leave from the Order dated the 27th August, 1965 of the Punjab High Court (Circuit Bench) at Delhi in Civil Revision No. 289-D of 1965.

S. N. Andley, Ramshwar Nath and Mahinder Narain, Advocates of M/s. Rajinder Narain & Co., for Appellants.

A. K. Sen and B. Sen, Senior Advocates (B. P. Maheshwari, P. D. Bhargava and M. S. Narasimhan, Advocates, with them), for Respondents.

10th March, 1966.

The Judgment of the Court was delivered by

Subba Rao J—This appeal by Special Leave is directed against the order of the Punjab High Court confirming that of the Subordinate Judge, Delhi, striking out the defence of the appellant under section 151 of the Code of Civil Procedure, hereinafter called the Code

Kanhaya Lal Bhargava, the 1st respondent filed a suit on 27th April, 1962 in the Court of the Subordinate Judge, First Class, Delhi, against Messrs Ram Chand & Sons Sugar Mills Private Limited the appellant, and one Ram Sarup for the recovery of a sum of Rs 45 112 94 Pending the suit, on 27th October, 1964, the 1st respondent filed an application in the said Court under Order 11, rule 21 of the Code read with Order 29, rule 3 thereof, for striking off the defence or so the alternative for directing Jugal Kishore, a director, of the appellant company, to appear in Court on 14th December 1964 On 3rd December, 1964 the Court made an order therein directing the said Jugal Kishore to be present in Court on 14th December, 1964, to answer material questions relating to the suit The appellant took a number of adjournments to produce the said Jugal Kishore on the ground that the latter was ill On 3rd February, 1965, the Court gave the appellant a final opportunity to produce the said Jugal Kishore Even so, the appellant took two more adjournments to produce him but did not do so on the ground that he was ill Finally on 25th February 1965, the Court issued a notice to the 1st defendant, appellant hereinafter to show cause why his defence should not be struck off On 16th March, 1965, after hearing the arguments the Court held that Jugal Kishore had failed to comply with the orders of the Court and was persistent in his default in spite of chances given to him, and on that finding it struck off the defence of the appellant The High Court, on revision held that Jugal Kishore did not appear in Court in spite of orders to that effect and that the learned Subordinate Judge had jurisdiction to strike out the defence of the appellant It further negatived the contention of the appellant that it was not in its power to compel Jugal Kishore to appear in Court on the ground that he was the director of the company and was under its control and, therefore, the appellant-company could not be heard to say that one of the directors did not obey the orders of the Court Hence the present appeal

The argument of Mr S N Andley, learned Counsel for the appellant, may be briefly stated thus The Code of Civil Procedure provides express power for a Court to strike out defence against a party under specified circumstances and therefore, section 151 thereof cannot be invoked to strike out the defence in other circumstances for to do so will be to override the provisions of the Code Order 29, rule 3 of the Code does not empower the Court to require the personal appearance of a director other than a director who signed and verified the pleading without the meaning of Order 29, rule 1 thereof

Mr Seo learned Counsel for the respondent, on the other hand, contended that the Court had ample jurisdiction to strike out the defence of a party if he was guilty of abuse of the process of the Court In the instant case, he contended, Jugal Kishore, one of the permanent directors of the appellant company had adopted a recalcitrant attitude in defying the orders of the Court to be present for interrogation and therefore, the Subordinate Judge rightly, after giving every opportunity for him to be present, struck off the appellant's defence

Section 151 of the Code reads

Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court

The words of the section appear to be rather wide But the decisions of this Court, by construction, limited the scope of the said section In *Padam Sen v The State of Uttar Pradesh*¹, the question raised was whether a Munsif had inherent powers under section 151 of the Code to appoint a commissioner to seize account books

¹ (1961) 2 S C J 79 (1961) M L J (Cr) (S C) 22 (1961) 1 S C R 884 887 A 1 R 1961 05 (1961) 2 A n W R (S C) 22 (1961) 2 M L J S C 218

This Court held that he had no such power. Raghubar Dayal, J., speaking for the Court, observed :

“The inherent powers of the Court are in addition to the powers specifically conferred on the Court by the Code. They are complementary to those powers and therefore it must be held that the Court is free to exercise them for the purposes mentioned in section 151 of the Code when the exercise of these powers is not in any way in conflict with what has been expressly provided in the Code or against the intentions of the Legislature. It is also well recognised that the inherent power is not to be exercised in a manner which will be contrary to or different from the procedure expressly provided in the Code.”

This Court again in *Manohar Lal Chopra v. Rai Bahadur Rao Raja Seth Hiralal*¹, considered the question whether a Court had inherent power under section 151 of the Code to issue a temporary injunction restraining a party from proceeding with a suit in another State. In that context, Raghubar Dayal, J., after quoting the passage cited above from his earlier judgment, interpreted the said observations thus :

“These observations clearly mean that the inherent powers are not in any way controlled by the provisions of the Code as has been specifically stated in section 151 itself. But those powers are not to be exercised when their exercise may be in conflict with what has been expressly provided in the Code or against the intentions of the Legislature. This restriction, for practical purposes, on the exercise of these powers is not because these powers are controlled by the provisions of the Code but because it should be presumed that the procedure specifically provided by the Legislature for orders in certain circumstances is dictated by the interests of justice.”

This Court again in *Arjun Singh v. Mohindra Kumar*², considered the scope of section 151 of the Code. One of the questions raised was whether an order made by a Court under a situation to which Order 9, rule 7, of the Code did not apply, could be treated as one made under section 151 of the Code. Rajagopala Ayyangar, J., made the following observations :

“It is common ground that the inherent power of the Court cannot override the express provisions of the law. In other words, if there are specific provisions of the Code dealing with a particular topic and they expressly or by necessary implication exhaust the scope of the powers of the Court or the jurisdiction that may be exercised in relation to a matter the inherent power of the Court cannot be invoked in order to cut across the powers conferred by the Code. The prohibition contained in the Code need not be express but may be implied or be implicit from the very nature of the provisions that it makes for covering the contingencies to which it relates.”

Having regard to the said decisions, the scope of the inherent power of a Court under section 151 of the Code may be defined thus : The inherent power of a Court is in addition to and complementary to the powers expressly conferred under the Code. But that power will not be exercised if its exercise is inconsistent with, or comes into conflict with, any of the powers expressly or by necessary implication conferred by the other provisions of the Code. If there are express provisions exhaustively covering a particular topic, they give rise to a necessary implication that no power shall be exercised in respect of the said topic otherwise than in the manner prescribed by the said provisions. Whatever limitations are imposed by construction on the provisions of section 151 of the Code, they do not control the undoubted power of the Court conferred under section 151 of the Code to make a suitable order to prevent the abuse of the process of the Court.

Now let us look at the relevant provisions of the Code.

Order 29, rule 1.—In suits by or against a corporation, any pleading may be signed and verified on behalf of the corporation by the secretary or by any director or other principal officer of the corporation who is able to depose to the facts of the case.

Rule 2.—Subject to any statutory provision regulating service of process, where the suit is against a corporation, the summons may be served—

(a) on the secretary, or on any director, or other principal officer of the corporation, or

(b) * * * * *

1. (1962) 1 S.C.R. (Supp.) 450, 461; A.I.R. 1962 S.C. 527. 2. (1964) 5 S.C.R. 946, 968; A.I.R. 1964 S.C. 993.

Rule 3—The Court may, at any stage of the suit, require the personal appearance of the secretary or of any director, or other principal officer of the corporation who may be able to answer material questions relating to the suit

The contention of the learned Counsel for the appellant is that the director mentioned in rule 3 is the director mentioned in rule 1 thereof. To put it in other words, the director who signs and verifies the pleadings can only be required to appear personally to answer material questions relating to the suit. Though this contention appears to be plausible it is not sound. Rules 1, 2 and 3, of Order 29 of the Code use the words "any director". Under rule 1 thereof a director who is able to depose to the facts of the case may sign and verify the pleadings, under rule 2, a summons may be served upon any director, and under rule 3 any director who may be able to answer material questions relating to the suit may be required to appear personally before the Court. The adjective "any" indicates that any one of the directors with the requisite qualifications, prescribed by rules 1, 2 and 3 can perform the functions laid down in each of the rules respectively. One can visualize a situation where a director who signed and verified the pleadings may not be in a position to answer certain material questions relating to the suit. If so, there is no reason why the director who may be able to answer such material questions is excluded from the scope of rule 3. Such an interpretation will defeat the purpose of the said rule. Therefore, "any director" in rule 3 need not be the same director who has signed and verified a pleading or on whom summons has been served. He can be any one of the directors who will be in a position to answer material questions relating to the suit.

Even so, learned Counsel for the appellant contended that Order 29, rule 3 of the Code did not provide for any penalty in case the director required to appear in Court failed to do so. By drawing an analogy from other provisions where a particular default carried a definite penalty, it was argued that in the absence of any such provision it must be held that the Legislature intentionally had not provided for any penalty for the said default. In this context the learned Counsel had taken us through Order 9, rule 12, Order 10, rule 4, Order 11, rule 21, Order 16, rule 20, and Order 18, rules 2 and 3 of the Code. No doubt under these provisions particular penalties have been provided for specific defaults. For certain defaults, the relevant orders provide for making an *ex parte* decree or for striking out the defence. But it does not follow from these provisions that because no such consequential provision is found in Order 29, the Court is helpless against recalcitrant plaintiff or defendant who happens to be a company. There is nothing in Order 29 of the Code, which, expressly or by necessary implication, precludes the exercise of the inherent power of the Court under section 151 of the Code. We are, therefore, of the opinion that in a case of default made by a director who failed to appear in Court when he was so required under Order 29, rule 3, of the Code, the Court can make a suitable consequential order under section 151 of the Code as may be necessary for the ends of justice or to prevent abuse of the process of the Court.

The next question is whether the Court can, as it did in the present case, strike off the defence of the appellant for the default made by its director to appear in Court. Learned Counsel for the respondent contended that both the Courts in effect found that the director was guilty of a recalcitrant attitude and that he had abused the process of the Court and, therefore, the Subordinate Judge had rightly exercised his inherent power in striking off the defence of the appellant. We are satisfied, as the Courts below were, that Jugal Kishore, the director of the appellant-company, purposely for one reason or other, defied the orders of the Court on the pretext of illness and had certainly abused the process of the Court. The learned Subordinate Judge would have been well within his rights to take suitable action against him, but neither of the Courts found that the appellant was responsible or instrumental for the director not attending the Court. Unless there is a finding of collusion between the appellant and the director in that the former prevented the latter from appearing in Court, we find it difficult to make the company constructively liable for the default of one of its directors. Many situations may be visualized when one of the directors

may not obey the directions of the company or its board of directors or may be even working against its interests.

It cannot be disputed that a company and the directors of the company are different legal personalities. The company derives its powers from the memorandum of association. Some of the powers are delegated to the directors. For certain purposes they are said to be trustees and for some others to be the agents or managers of the company. It is not necessary in this case to define the exact relationship of a director *qua* the company. The acts of the directors within the powers conferred on them may be binding on the company. But their acts outside the said powers will not bind the company. It is not possible to hold that the director in refusing to respond to the notice given by the Court was acting within the scope of the powers conferred on him. He is only liable for his acts and not the company. If it was established that the company was guilty of abuse of the process of the Court by preventing the directors from attending the Court, the Court would have been justified in striking off the defence. But no such finding was given by the Courts below.

The orders of the Courts below are not correct. We set aside the said orders and direct the Subordinate Judge to proceed with the suit in accordance with law.

The appeal is allowed, but, in the circumstances of the case, without costs.

K.G.S.

Appeal allowed; Suit remitted to trial Court.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction).

PRESENT:—K. N. WANCHOO AND S. M. SIKRI, JJ.

Murlidhar Himatsingka and another

.. *Appellants**

v.

Commissioner of Income-tax, Calcutta

.. *Respondent.*

Income-tax Act (XI of 1922), section 23 (5) (a)—Firm and partner—Registered firm—Assessment—Apportionment of income among partners—Income if assessable in the hands of the partner or as the real income of some other person—If income of another firm—Firm, liable to be assessed—Assessee, partner in a registered firm, carrying on his individual business—Sub-partnership in respect of individual business by assessee and his sons—Deed providing for the division of the share of profits and losses of the assessee in the registered firm—Sub-partnership—Creation of a superior-title—Diversion of income before it becomes the income of the assessee—Assessable as the income of the sub-partnership—Income—Receipt—Application or diversion—Tests.

The assessee, a partner in a registered firm, was also carrying on business in his own name, entered into a partnership with his sons and grandson in respect of his business, under a deed which provided also that his share of profits and losses in the registered partnership of which he was a partner, shall belong to the partnership, while the capital with its assets and liabilities in the registered firm shall belong to him. For the assessment year 1955-56 the Income-tax Officer included the income from the share in the registered firm, in the individual assessment of the assessee. On appeal the Appellate Commissioner, referring to section 23 (5) (a) of the Act, held as the assessee was a partner in the registered firm, his share had to be assessed in his hands and as the subsequent agreement was merely an arrangement which came into force after the profits were earned and not before they were earned. The Tribunal confirmed the appellate order dismissing the two appeals preferred by the assessee and the firm consisting of the assessee and his sons and grandsons. On a reference the High Court answered the reference against the assessee by holding that it was a case of diversion of income by the assessee after it had accrued to him and it was not a diversion at the source by any overriding interest. The assessee and the firm appealed.

Held, that, there is nothing in section 23 (5) (a) of the Act that prevents the income from the registered firm being treated as the income of the firm consisting of the assessee, his sons and grandsons. The firm constituted a sub-partnership in respect of the assessee's share in the registered partnership.

The object of section 23 (5) (a) is not to assess the firm itself but to apportion the income among the various partners. After the income has been apportioned, the Income-tax Officer has to find whether it is the partner who is assessable, or whether the income should be taken to be the real in-

come of some other person. If it is the real income of another firm it is that firm which is liable to be assessed under section 23 (5) (a) of the Act.

In the case of a sub-partnership the sub-partnership creates a superior title and diverts the income before it becomes the income of the partner. In other words the partner in the main firm receives the income not only on his behalf but on behalf of the partners in the sub-partnership.

The true is whether the amount sought to be deducted in truth never reached the assessee as his income. Obligations no doubt there are in every case but it is the nature of the obligation which is the decisive fact. There is a difference between an amount which a person is obliged to apply out of his income and an amount which by the nature of the obligation cannot be said to be a part of the income of the assessee. Where by the obligation income is diverted before it reaches the assessee it is deductible but where the income is required to be applied to discharge an obligation after such income reaches the assessee the same consequences in law, does not follow. The first is a case in which the income reaches the assessee who even if he were to collect it does so not as part of his income but for and on behalf of the person to whom it is payable. The second payment is merely an obligation to pay another a portion of one's own income which has been received and is since applied.

Appeals by Special Leave from the Judgment and Order dated the 1st August, 1962, of the Calcutta High Court in Income tax References Nos. 20 and 21 of 1959.

A K Sen Senior Advocate (*S C Mazumdar* and *J Datta Gupta*, Advocates, with him), for Appellants (In all the Appeals).

R M Hajarnavis Senior Advocate (*R Ganapathy Iyer* and *R N Sachithy*, Advocates, with him), for Respondent (In all the Appeals).

The Judgment of the Court was delivered by

Sikri, J.—These appeals by Special Leave are directed against the judgment of the High Court of Calcutta in two cases referred to it by the Income tax Appellate Tribunal, Calcutta Bench under section 66 (1) of the Indian Income tax Act (XI of 1922) (hereinafter called the Act). One of the references (Income tax Reference No. 20 of 1959) was made at the instance of *M/s Fatechand Murlidhar*, and the other (Income tax Reference No. 21 of 1959) was made at the instance of *Shri Murlidhar Himatsingka*. In the former reference the question referred was

"Whether on the facts and in the circumstances of the case the income of *Murlidhar Himatsingka* for his share in the firm of Messrs *Basantlal Ghanshyamdas* for the assessment years 1952-53 and 1953-54 was rightly excluded from the income of the applicant firm."

In the latter reference the question referred was

"Whether on the facts and circumstances of the case the income of *Murlidhar Himatsingka* for his share in the firm of Messrs *Basantlal Ghanshyamdas* for the assessment year 1955-56 was rightly included in his personal assessment for that year."

The facts and circumstances out of which these references were made are common because the real question raised by these references is whether the income of *Murlidhar Himatsingka*, from the firm of *M/s Basantlal Ghanshyamdas*, in which he was a partner should be included in his personal assessment or in the assessment of the firm of *Fatechand Murlidhar*, to which *Murlidhar Himatsingka* had purported to assign the profits and losses from *M/s Basantlal Ghanshyamdas*. It is sufficient to take the facts from the statement of the case in Income tax Reference No. 21 of 1959, made at the instance of *Murlidhar Himatsingka*. *Murlidhar Himatsingka* was carrying on business in shellac, jute, hessian etc. under the name and style of "*Fatechand Murlidhar*" at 14/1, Clive Row and 71, Burtolla Street, Calcutta. He was also a partner in the registered firm, Messrs *Basantlal Ghanshyamdas*, having 0.28 share. On 21st December, 1949, a deed of partnership was executed by the said *Murlidhar Himatsingka* and his two sons, *Madanlal Himatsingka* and *Radhaballav Himatsingka* and a grandson named *Mahabir Prasad Himatsingka*. The deed recited that *Murlidhar Himatsingka* had become too old and infirm to look after the various businesses and that *Madanlal* and *Radha Ballav* were already practically managing the business and that they had signified their intention to become the partners of the said firm "*Fatechand Murlidhar*" and had agreed to contribute capital, Rupees ten thousand, Rupees five thousand and Rupees five thousand respectively. The parties further agreed to become and be partners in the business mentioned in the deed. Clause 5 of this deed is important for our purpose and reads as follows :

"The profits and losses for the share of the said Murlidhar Himatsingka as partner in the said partnership firm of Basantlal Ghanshyamdas shall belong to the present partnership and shall be divided and borne by the parties hereto in accordance with the shares as specified hereafter, but the capital with its assets and liabilities will belong exclusively to Murlidhar Himatsingka the party hereto of the First Part and the parties hereto of the Second, Third and Fourth Parts shall have no lien or claim upon the said share capital or assets of the party hereto of the First Part in the business of the said Messrs. Basantlal Ghanshyamdas."

Clause 10 provides :

"The profits and losses (if any) of the partnership including the shares of the profits and losses of the said partnership firm of Basantlal Ghanshyamdas aforesaid shall be divided and borne by and between the parties in the following manner :—

Party hereto of the First Part—Six annas (Murlidhar Himatsingka).

Party hereto of the Second Part—Four annas (Madanlal Himatsingka).

Party hereto of the Third Part—Three annas (Radhaballav Himatsingka).

Party hereto of the Fourth Part—Three annas (Mahabirprasad Himatsingka)."

Clause 11 provides that :

"all partnership moneys and securities for money shall as and when received be paid into and deposited to the credit of the partnership account."

In clause 13 it is provided that :

"the party thereto of the First Part shall have the sole control and direction of the partnership business and his opinion shall prevail if there be any dispute between the parties hereto."

Clause 16 provides that :

"the net profits of the partnership after payment of all outgoings, interest on capital or loans and subject to the creation and maintenance of any reserve or other fund shall belong to the parties and the losses, if any, shall also be borne and paid by the parties in proportion to their shares as stated in clause 10 hereof."

For the assessment year 1955-56 the Income-tax Officer included the income from the share in the registered firm of Basantlal Ghanshyamdas in the individual assessment of Murlidhar Himatsingka. Murlidhar Himatsingka appealed to the Appellate Assistant Commissioner. Referring to section 23 (5) (a) of the Act, he held that as Murlidhar Himatsingka was a partner in the registered firm of Basantlal Ghanshyamdas, his share had to be assessed in his hands. He further held that the agreement was merely an arrangement which came into force after the profits were earned and not before they were earned. He held that this agreement being a subsequent disposition of profits, after they had been earned, had to be disregarded.

Murlidhar Himatsingka appealed to the Income-tax Appellate Tribunal. The Appellate Tribunal heard this appeal together with the two appeals filed by M/s. Fatechand Murlidhar. The Appellate Tribunal, agreeing with the views of the Appellate Assistant Commissioner, dismissed the appeal.

The High Court held that it was a case of diversion of income by Murlidhar Himatsingka after it had accrued to him and it was not a diversion at the source by any overriding interest. In the result, the High Court answered the questions in the affirmative in both the references. Murlidhar Himatsingka and M/s. Fatechand Murlidhar having obtained Special Leave, the appeals are now before us.

The learned Counsel for the appellants, Mr. A. K. Sen, contends that a partner's share is property capable of being assigned, mortgaged, charged and dealt with as any other property, and where a partner sells his share to a stranger, though that stranger does not become a partner yet the vendor partner holds the property as trustee for the purchaser and consequently the income received by the partner is not his income but the income of the purchaser. He says that similarly if a partner assigns part of his share the same result follows. He further contends that in this case, by the agreement dated 21st December, 1949, Murlidhar Himatsingka had entered into a sub-partnership with his two sons and a grandson in respect of his share in the firm Basantlal Ghanshyamdas, and it is the sub-partnership that is entitled to the income from the firm Basantlal Ghanshyamdas and not Murlidhar Himatsingka who must be taken to be acting on behalf of the firm Fatechand Murlidhar. Mr. Sen

further urges that the Indian Income tax Act taxes real income and not notional income and the real income in this case belonged not to Murlidhar but to M/s Fatechchand Murlidhar

Mr Hazarnavis, on the other hand contends that this agreement is a mere device for dividing income which had accrued to Murlidhar Himatsingka among his sons and grandson. In the alternative he contends that the Indian Income tax Act does not contemplate the application of section 23 (5) (a) twice. He says that the firm of Basantlal Ghanshyamdas was a registered firm and the Income tax Officer was bound, under section 23 (5) (a) to assess Murlidhar in respect of the income received from this firm, he could not carry this income to the assessment of another registered firm, namely, Fatechchand Murlidhar, and then apply section 23 (5) (a).

The first point that arises is whether the agreement dated 21st December, 1949, has succeeded in diverting the income from Murlidhar's share in M/s Basantlal Ghanshyamdas to M/s Fatechchand Murlidhar before it reached Murlidhar. What is the effect of the agreement? In our opinion the agreement dated 21st December, 1949, constituted a sub partnership in respect of Murlidhar's share in M/s Basantlal Ghanshyamdas. The High Court in this connection observed

At best it could be called a sub partnership entered into by Murlidhar with strangers in respect of his share of the partnership.

In arriving at this conclusion we attach importance to the fact that losses were also to be shared and the right to receive profits and pay losses became an asset of the firm, Fatechchand Murlidhar.

In *Commissioner of Income tax, Bombay v Sitaldas Tirathdas*¹, Hidayatullah, J speaking for the Court, laid down the following test for determining questions like the one posed above. After reviewing a number of authorities, he observed

'In our opinion on the true test is whether the amount sought to be deducted in truth, never reached the assessee as his income. Obligations no doubt there are in every case but it is the nature of the obligation which is the decisive fact. There is a difference between an amount which a person is obliged to apply out of his income and an amount which by the nature of the obligation cannot be said to be a part of the income of the assessee. Where by the obligation income is diverted before it reaches the assessee it is deductible, but where the income is required to be applied to discharge an obligation after such income reaches the assessee the same consequence in law does not follow. It is the first kind of payment which can truly be excused and not the second. The second payment is merely an obligation to pay another a portion of one's own income which has been received and is since applied. The first is a case in which the income never reaches the assessee who even if he were to collect it does so not as part of his income but for and on behalf of the person to whom it is payable.

This test clearly shows that it is not every obligation to apply income in a particular way that results in the diversion of income before it reaches the assessee. In its judgment in the above case (*Sitaldas Tirathdas v Commissioner of Income tax Bombay*)² the High Court of Bombay had observed

It is not essential that there should be a charge it is quite sufficient if there is a legally enforceable claim.

These observations must be treated as unsound. The test laid down by the Court is quite clear, though like some other tests it is not easy of application in all cases.

The other cases cited before us, namely, *K A Ramachar v Commissioner of Income tax, Madras*³ and *Probat Kumar Mitter v Commissioner of Income tax, West Bengal*⁴, do not assist us in disposing of this case because the facts are not similar. Only two cases, one of the Bombay High Court and the other of the Calcutta High Court, have close resemblance to the facts of this case and we may now consider them. In *Ratilal B. Dastani v Commissioner of Income tax, Bombay*⁵, the assessee

1 (1961) 1 MLJ (SC) 128 (1961) 1 An WR (SC) 128 (1961) 1 SCJ 472 (1961) 41 ITR 367 at p 374 (1961) 2 SCR 634 AIR 1961 SC 728
2 (1958) 33 ITR 390 at p 394
3 (1962) 2 SCJ 504 (1961) 42 ITR 25

(1961) 3 SCR 380 AIR 1961 SC 1059
4 (1961) 41 ITR 624 (1962) 2 MLJ (SC) 119 (1962) 2 An WR (SC) 119 (1963) SCJ 496 (1961) 3 SCR 37 AIR 1961 SC 1019
5 (1959) 36 ITR 18

who was one of the sixteen partners in a registered partnership had contributed Rs. 25,000 out of the capital of the partnership, Rs. 3,45,000. In order to contribute this capital of Rs. 25,000 he had entered into an agreement with four others on the same date on which the registered partnership deed was executed, which provided for contribution of diverse sums by the four others and it was further provided in this agreement that the five parties would share the profits and losses in proportion to their individual contribution. It was also mentioned that the terms and conditions mentioned in the registered partnership were to be applicable and binding on them. The Bombay High Court held that the assessee was liable to be assessed only in respect of his share of the profits of the registered partnership. In coming to this conclusion, the High Court relied on two other decisions of the same Court namely, *Motilal Manekchand v. Commissioner of Income-tax*¹, and *Sitaldas Tirathdas v. Commissioner of Income-tax*². As pointed out by the learned Counsel for the respondent, Mr. Hazarnavis, *Sitaldas Tirathdas v. Commissioner of Income-tax*², was reversed by this Court in *Commissioner of Income-tax v. Sitaldas Tirathdas*³. Hidayatullah, J., at p. 374 of his judgment reversing the judgment of the Bombay High Court had also referred to *Motilal Manekchand v. Commissioner of Income-tax*¹, but did not expressly dissent from this case. In our opinion, the case of *Ratilal B. Dastari v. Commissioner of Income-tax, Bombay*⁴, was rightly decided, although the reasoning given by the learned Judges of the High Court has to some extent not been accepted by Hidayatullah, J., in *Commissioner of Income-tax v. Sitaldas Tirathdas*³. We say so for the following reasons. Lindley on Partnership, 12th Edn., page 99, deals with sub-partnerships as follows :—

"A sub-partnership is, as it were, a partnership within a partnership; it presupposes the existence of a partnership to which it is itself subordinate. An agreement to share profits only constitutes a partnership between the parties to the agreement. If, therefore, several persons are partners and one of them agrees to share the profits derived by him with a stranger, this agreement does not make the stranger a partner in the original firm. The result of such an agreement is to constitute what is called a sub-partnership, that is to say, it makes the parties to it partners *inter se*; but it in no way affects the other members of the principal firm."

He further states :

"Since the decision of the House of Lords in *Cox v. Hickman*⁵, a sub-partner could not before the Partnership Act, 1890, be held liable to the creditors of the principal firm by reason only of his participation in the profits thereof, and there is nothing in that Act to alter the law in this respect."

Sub-partnerships have been recognised in India and registration accorded to them under the Indian Income-tax Act : (See *Commissioner of Income-tax, Punjab v. Laxmi Trading Company*⁶).

The question then arises is whether the interest of the sub-partnership in the profits received from the main partnership is of such a nature as diverts the income from the original partner to the sub-partnership. Suppose that *A* is carrying on a business as a sole proprietor and he takes another person *B* as a partner. There is no doubt that the income derived by *A* after the date of the partnership cannot be treated as his income ; it must be treated as the income of the partnership consisting of *A* and *B*. What difference does it make in principle where *A* is not carrying on a business as a sole proprietor but as one of the partners in a firm ? There is no doubt that there is this difference that the partners of the sub-partnership do not become partners of the original partnership. This is because the Law of Partnership does not permit a partner, unless there is an agreement to the contrary, to bring strangers into the firm as partners. But as far as the partner himself is concerned, after the deed of agreement of sub-partnership, he cannot treat the income as his own. Prior to the case of *Cox v. Hickman*⁵, sub-partners were even liable to the creditors of the original partnership. Be that as it may, and whether he is treated as an assignee within section 29 of the Indian Partnership Act, as some cases do, a sub-partner has

1. (1957) 31 I.T.R. 735 : I.L.R. (1957) 41 I.T.R. 367 : (1961) 2 S.C.R. 634 : Bom. 495 : 59 Bom.L.R. 499 : A.I.R. 1957 A.I.R. 1961 S.C. 728.
 2. (1958) 33 I.T.R. 390 at p. 394.
 3. (1961) 1 M.L.J. (S.C.) 128 : (1961) 1 S.C.J. 472 : (1961) 1 An.W.R. (S.C.) 128 :
 4. (1959) 36 I.T.R. 18.
 5. (1860) 8 H.L. Cas. 268.
 6. (1953) 24 I.T.R. 173.

definite enforceable rights to claim a share in the profits accrued to or received by the partner

The decision of this Court in *Charandas Haridas v Commissioner of Income tax*¹ seems to support at least by inference this conclusion. In that case the facts were as follows. Charandas Haridas was the *karta* of a Hindu undivided family consisting of his wife his three minor sons and himself. He was a partner in six managing agency firms and the share of the managing agency commission received by him as such partner was being assessed as the income of the family. By a memorandum executed by the coparceners of the family a partial partition of the income from the managing agency was brought about. The memorandum stated

We have decided that in respect of the commissions which accrues from 1st January 1946 and received after that date each of us becomes absolute owner of his one fifth share and thereafter from that date these commissions cease to be the joint property of our family

This Court held that the document effectively divided the income and the income could no longer be treated as that of the Hindu undivided family. This case shows that although the *karta* continued to be a partner in the managing agency firms yet the character in which he received the income *vis a vis* the Hindu undivided family had changed and the Court gave effect to the change of his position. Previously he was acting as a *karta* on behalf of the Hindu undivided family in the managing agency firms, later he became a partner on behalf of the members of the family. It seems to us that when a sub-partnership is entered into the partner changes his character *vis a vis* the sub-partners and the Income tax Authorities although other partners in the original partnership are not affected by the changes that may have taken place.

In our view the Calcutta High Court decision relied on by the High Court and the learned Counsel for the respondent (*Mahaliram Santhalia v Commissioner of Income tax*²) was wrongly decided. The facts in that case were these. Mahaliram Santhalia was a partner in the firm M/s Benares Steel Rolling Mills. He was also a partner in another firm named M/s Radhakissen Santhalia. By agreement dated 3rd April 1944 between the partners of M/s Radhakissen Santhalia it was provided that the partnership income from M/s Benares Steel Rolling Mills would belong not to Mahaliram Santhalia individually but to the firm of M/s Radhakissen Santhalia. The High Court of Calcutta held that the agreement amounted only to voluntary disposition by Mahaliram Santhalia of his income and there was no diversion of income to the firm M/s Radhakissen Santhalia before it became Mahaliram Santhalia's income. The High Court observed at p 272

If as Mr Mitra conceded Mahaliram was rightly taken as a partner of the Benares Steel Rolling Mills in his personal capacity and if a one fourth share of the income was rightly allocated to him, any agreement between him and his three partners of the firm of Radhakissen Santhalia under which the income was to be treated as the income of the whole firm could only be an agreement by which Mahaliram Santhalia was allowing what was really his income to be treated as the income of the firm or in other words an agreement by which he was applying or distributing an income which he had already himself earned and received. Such application or distribution would be a voluntary act of Mahaliram Santhalia in respect of a sum which it was conceded had rightly been included in his own total income and therefore was his own income. If the moment the share of the income from the Benares Steel Rolling Mills was allocated to Mahaliram Santhalia it became his income and liable to be included in his own total income for the purpose of his personal assessment, an agreement by him with other persons regarding the rights to that income could only be a voluntary disposition of his income by him. No question of a diversion by superior title could possibly arise.

With respect, we are unable to agree with most of this reasoning. In our view, in the case of a sub-partnership the sub-partnership creates a superior title and diverts the income before it becomes the income of the partner. In other words the partner in the main firm receives the income not only on his behalf but on behalf of the partners in the sub-partnership. The Calcutta High Court also seems to be in our opinion erroneously impressed by the argument that

¹ (1960) S C J 929 (1960) 39 I T R 202 2 (1958) 33 I T R 261 A I R 1958 Cal
(1960) 3 S C R 296 (1960) 62 Bom L R 910 394
A I R 1960 S C 910

"it is impossible to see how, after a proportionate share of the income had thus been included in the total income of a partner for the purposes of his personal assessment, it could then go anywhere else or could be further divided between such partners and other parties."

We will deal with this aspect while dealing with the second point raised by the learned Counsel for the Revenue.

Mr. Hazarnavis, in this connection, drew our attention to the following passage in *K. A. Ramachar v. Commissioner of Income-tax, Madras*¹:

"This in our opinion, is neither in accordance with the law of partnership nor with the facts as we have found on the record. Under the law of partnership, it is the partner and the partner alone who is entitled to the profits. A stranger, even if he were an assignee, has and can have no direct claim to the profits. By the deeds in question, the assessee merely allowed a payment to his wife and daughters to constitute a valid discharge in favour of the firm; but what was paid was, in law, a portion of his profits, or in other words, his income."

This passage was also relied on by the High Court. In our opinion, these observations have to be read in the context of the facts found in that case. In that case it was neither urged nor found that a sub-partnership came into existence between the assessee who was a partner in a firm and his wife, married daughter and minor daughter. It was a pure case of assignment of profits (and not losses) by the partner during the period of eight years. Further, the fact that a sub-partner can have no direct claim to the profits *vis-a-vis* the other partners of the firm and that it is the partner alone who is entitled to profits *vis-a-vis* the other partners does not show that the changed character of the partner should not be taken into consideration for income-tax purposes. This Court held in *Commissioner of Income-tax, Gujarat v. Abdul Rahim & Co.*², that registration of the firm could not be refused on the ground that a partner was a *benamidar* and that a *benamidar* is a mere trustee of the real owner and he has no beneficial interest in the profits of the business of the real owner. Under the law of partnership it is the *benamidar* who would be entitled to receive the profits from the other partners but for income-tax purposes it does not mean that it is the *benamidar* who alone can be assessed in respect of the income received by him.

In conclusion we hold that the High Court was in error in holding that there was no question of an overriding obligation in this case and that the income remained the income of Murlidhar Himatsingka in spite of the sub-partnership created by him under the agreement dated 21st December, 1949.

The second contention raised by Mr. Hazarnavis was not debated in the High Court, but in our opinion, there is no substance in this contention. We have already mentioned that a *benamidar* can be a partner in a firm. Now, if Mr. Hazarnavis's contention is right, under section 23 (5) (a) of the Act it is only he who could be assessed but there is no warrant for this proposition. In *Commissioner of Income-tax, West Bengal v. Kalu Babu Lal Chand*³, this Court mentioned with approval *Kaniram Hazarimull v. Commissioner of Income-tax*⁴, where income from a partnership received by a *karta* was held to be assessable in the hands of the Hindu undivided family. This Court observed at p. 128 as follows:

"If for the purpose of contribution of his share of the capital in the firm the *karta* brought in monies out of the till of the Hindu undivided family, then he must be regarded as having entered into the partnership for the benefit of the Hindu undivided family and as between him and the other members of his family he would be accountable for all profits received by him as his share out of the partnership profits and such profits would be assessable as income in the hands of the Hindu undivided family. Reference may be made to the cases of *Kaniram Hazarimull v. Commissioner of Income-tax*⁴, and *Dhanwatay v. Commissioner of Income-tax*⁵, in support of this view."

The object of section 23 (5) (a) is not to assess the firm itself but to apportion the income among the various partners. After the income has been apportioned, the Income-tax Officer has to find whether it is the partner who is assessable or whether the income should be taken to be the real income of some other person.

1. (1962) 2 S.C.J. 504 : (1961) S.C.R. 380 : (1961) 42 I.T.R. 25 at p. 29 : A.I.R. 1961 S.C. 1059.

2. (1965) 1 I.T.J. 462 : (1965) 1 S.C.J. 434 : (1965) 55 I.T.R. 651 : A.I.R. 1965 S.C. 1703.

3. (1960) S.C.J. 311 : (1960) 1 An.W.R. (S.C.) 81 : (1960) 1 M.L.J. (S.C.) 81 : (1960) 1 S.C.R. 320 : (1959) 37 I.T.R. 128 : A.I.R. (1959) S.C. 1289.

4. (1955) 27 I.T.R. 294.

5. (1957) 32 I.T.R. 682.

If it is the real income of another firm, it is that firm which is liable to be assessed under section 23 (5) (a) of the Act

This view was taken by the Bombay High Court in *Ratilal B Dastani v Commissioner of Income tax*¹. The Bombay High Court observed at p 24 as follows

'The principle asserted in that case is that even in the case of a partner in a registered firm when the question arises as to his individual assessment what is to be considered is not the income allocated to his share by employing the machinery of section 23 (5) (a) but his real income and that real income is what remains after deducting the amounts which may be said to have been diverted and never constituted his real income and such amounts will have to be excluded before his real income is reached

In conclusion we hold that there is nothing in section 23 (5) (a) that prevents the income from the firm Basantlal Ghanshyamdas being treated as the income of M/s Fatchchand Murlidhar and section 23 (5) (a) being applied again

In the result we accept the appeals, set aside the judgment of the High Court and answer the questions in the negative. The appellants will be entitled to costs here and in the High Court. One hearing fee

V S

Appeals allowed

THE SUPREME COURT OF INDIA

(Criminal Appellate Jurisdiction)

PRESENT —K SUBBA RAO, V RAMASWAMI AND J M SHELAT, JJ

V D Jhungan

Appellant*

v

The State of Uttar Pradesh

Respondent

Prevention of Corruption Act (II of 1947) section 5 (2) read with section 5 (1) (d)—Offence under —Proof of payment of money—Presumption under section 4 (1)—Onus on person against whom presumption is drawn and the prosecution—Comparative extent of

In a prosecution for an offence under section 161, Penal Code and section 5 (2) read with section 5 (1) (d) of the Prevention of Corruption Act whenever it is shown that the valuable thing has been received by the accused, section 4 (1) of the Prevention of Corruption Act requires the presumption to be drawn without anything more that it was received as illegal gratification. Then the burden is on the accused to rebut the presumption. But he is not required to discharge that burden by leading evidence to prove his case beyond a reasonable doubt. It is sufficient if the accused person succeeds in proving a preponderance of probability in favour of his case. As soon as the accused succeeds in doing so the burden is shifted to the prosecution which still has to discharge its original onus that never shifts *i.e.*, that of establishing on the whole case the guilt of the accused beyond a reasonable doubt.

Appeal by Special Leave from the Judgment and Order dated the 20th March, 1964 of the Allahabad High Court (Lucknow Bench) at Lucknow in Criminal Appeal No 20 of 1962.

Jai Gopal Sethi, Senior Advocate, (C L Sareen and R L Kohli, Advocates with him), for Appellant

S T Desai, Senior Advocate, (R I Mehta and O P Rana, Advocates with him), for Respondent

The Judgment of the Court was delivered by

Ramaswami, J—The appellant was tried for offences under section 161, Indian Penal Code and section 5 (2) read with section 5 (1) (d) of the Prevention of Corruption Act by Special Judge, Anti Corruption, Lucknow, who by his judgment dated 8th January, 1962, convicted the appellant and sentenced him to three years' rigorous imprisonment and a fine of Rs 2 000. In default for payment of fine the appellant was further ordered to undergo rigorous imprisonment for one year. The appellant preferred an appeal to the Allahabad High Court, Lucknow Bench, which dismissed the appeal by its judgment dated 20th March, 1964 and affirmed the conviction and

sentence imposed by the Special Judge upon the appellant. This appeal is brought, by Special Leave, from the judgment of the Allahabad High Court, Lucknow Bench.

The appellant was employed as Assistant Director Enforcement, Government of India, Ministry of Commerce at Kanpur and used to deal with matters regarding the cancellation of licences of cloth dealers at Kanpur. On or about 5th September, 1951, the appellant received a confidential letter dated 30th August, 1951 from the District Magistrate, Kanpur. On the same date the appellant called one Ram Lal Kapoor who was the Legal Adviser of New Victoria Mills Ltd. at his house. The appellant showed him the letter of the District Magistrate and on the strength of that letter he demanded through Ram Lal Kapoor a bribe of Rs. 30,000 from Sidh Gopal for saving his licence from being cancelled. It appears that Sidh Gopal was a partner of various firms dealing in cloth and it was suspected that these firms were indulging in black-marketing in cloth. Sidh Gopal came to the appellant on 9th September, 1951 to talk over the matter and the appellant made the same demand of bribe from him. On 11th September, 1951, the appellant is alleged to have agreed with Ram Lal Kapoor to receive a sum of Rs. 10,000 as first instalment of the bribe from Sidh Gopal through Ram Lal Kapoor. Accordingly on 11th September, 1951 at about 8 P.M. the appellant went to the house of Ram Lal Kapoor and accepted the bribe of Rs. 10,000 in currency notes and also a *than* of long cloth from the said Ram Lal Kapoor undertaking that in lieu thereof the appellant would not report against Sidh Gopal and thereby save his licence from cancellation. A raid had been pre-arranged and the raiding party consisting of Shri Satish Chander, P.W. 1 and Shri Onkar Singh, P.W. 2, the District Magistrate and the Senior Superintendent of Police respectively were lying in wait at the premises of Ram Lal Kapoor. At about 9-45 P.M. the appellant came out of the bungalow of Ram Lal Kapoor and on the agreed signal being given, the raiding party came and on search of the appellant an amount of Rs. 10,000 was found from his person. At the time of the recovery of the money the appellant made a statement that the amount received by him was as a loan as he wanted to purchase a bungalow. The defence of the appellant was that he never negotiated with Ram Lal Kapoor or Sidh Gopal regarding the bribe but the appellant had been falsely implicated because he had prosecuted one Bhola Nath of the firm of M/s. Mannulal Sidh Gopal under section 7 of Essential Supplies Act and the District Magistrate had arrested Bhola Nath and kept him under detention under the powers conferred by the Preventive Detention Act. In order to take revenge for the arrest of Bhola Nath, Sidh Gopal and Ram Lal Kapoor had conspired together and falsely implicated the appellant. The Special Judge disbelieved the case of the appellant and held that the prosecution evidence sufficiently established the charges under section 161, Indian Penal Code and section 5 (2) read with section 5 (1) (d) of the Prevention of Corruption Act. The findings of the trial Court have been affirmed by the Allahabad High Court in appeal which also rejected the case of the appellant as untrue and held that the amount of Rs. 10,000 was received by the appellant from Ram Lal Kapoor by way of illegal gratification and not as a loan for purchasing a house.

The first question for determination is whether a presumption under sub-section (1) of section 4 of the Prevention of Corruption Act arises in this case. That provision reads as follows :

"Where in any trial of an offence punishable under section 161 or section 165 of the Indian Penal Code it is proved that an accused person has accepted or obtained, or has agreed to accept or attempted to obtain, for himself or for any other person, any gratification (other than legal remuneration) or any valuable thing from any person, it shall be presumed unless the contrary is proved that he accepted or obtained or agreed to accept or attempted to obtain, that gratification or that valuable thing, as the case may be, as a motive or reward such as is mentioned in the said section 161, or, as the case may be, without consideration or for a consideration which he knows to be inadequate."

It was held by this Court in *Dhanwantrai Balwantrai Desai v. State of Maharashtra*¹, that in order to raise the presumption under this sub-section what the prosecu-

tion has to prove is that the accused person has received "gratification other than legal remuneration" and when it is shown that he has received a certain sum of money which was not a legal remuneration, then the condition prescribed by this section is satisfied and the presumption thereunder must be raised. It was contended in that case that the mere receipt of any money did not justify the raising of the presumption and that something more than the mere receipt of the money had to be proved. The argument was rejected by this Court and it was held that the mere receipt of the money was sufficient to raise a presumption under the sub-section. A similar argument was addressed in *C I Emden v State of Uttar Pradesh*¹. In rejecting that argument this Court observed:

If the word 'gratification' is construed to mean money paid by way of bribe then it would be futile or superfluous to prescribe for the raising of the presumption. Technically it may no doubt be suggested that the object which the statutory presumption serves on this construction is that the Court may then presume that the money was paid by way of a bribe as a motive or reward as required by section 161 of the Code. In our opinion this could not have been the intention of the Legislature in prescribing the statutory presumption under section 4 (1).

This Court proceeded to state:

"It cannot be suggested that the relevant clause in section 4 (1) which deals with the acceptance of any valuable thing should be interpreted to impose upon the prosecution an obligation to prove not only that the valuable thing has been received by the accused but that it has been received by him without consideration or for a consideration which he knows to be inadequate. The plain meaning of this clause undoubtedly requires the presumption to be raised whenever it is shown that the valuable thing has been received by the accused without anything more. If that is the true position in respect of the construction of this part of section 4 (1) it would be unreasonable to hold that the word 'gratification' in the same clause imports the necessity to prove not only the payment of money but the incriminating character of the said payment. It is true that the Legislature might have used the word 'money' or 'consideration' as has been done by the relevant section of the English statute.

It must therefore, be held that, in the circumstances of the present case, the requirements of sub-section (1) of section 4 have been fulfilled and the presumption thereunder must be raised.

The next question arising in this case is as to what is the burden of proof placed upon the accused person against whom the presumption is drawn under section 4 (1) of the Prevention of Corruption Act. It is well-established that where the burden of an issue lies upon the accused, he is not required to discharge that burden by leading evidence to prove his case beyond a reasonable doubt. That is, of course, the test prescribed in deciding whether the prosecution has discharged its onus to prove the guilt of the accused, but the same test cannot be applied to an accused person who seeks to discharge the burden placed upon him under section 4 (1) of the Prevention of Corruption Act. It is sufficient if the accused person succeeds in proving a preponderance of probability in favour of his case. It is not necessary for the accused person to prove his case beyond a reasonable doubt or in default to incur a verdict of guilty. The onus of proof lying upon the accused person is to prove his case by a preponderance of probability. As soon as he succeeds in doing so the burden is shifted to the prosecution which still has to discharge its original, onus that never shifts, i.e., that of establishing on the whole case the guilt of the accused beyond a reasonable doubt. It was observed by Viscount Sankey in *Woolmington v Director of Public Prosecutions*², that:

"No matter what the charge or where the trial the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."

This principle is a fundamental part of the English Common Law and the same position prevails in the Criminal Law of India. That does not mean that if the statute places the burden of proof on an accused person he is not required to establish his plea, but the degree and character of proof which the accused is expected to furnish in support of his plea cannot be equated with the degree and character of

proof expected from the prosecution which is required to prove its case. In *Rex v. Carr-Briant*¹, a somewhat similar question arose before the English Court of Appeal. In that case, the appellant was charged with the offence of corruptly making a gift or loan to a person in the employ of the War Department as an inducement to show, or as a reward for showing favour to him. The charge was laid under the Prevention of Corruption Act, 1916 and in respect of such a charge, section 2 of the Prevention of Corruption Act, 1916, had provided that a consideration shall be deemed to be given corruptly unless the contrary is proved. The question which arose before the Court was : what is the accused required to prove if he wants to claim the benefit of the exception ? At the trial, the Judge had directed the jury that the onus of proving his innocence lay on the accused and that the burden of proof resting on him to negative corruption was as heavy as that ordinarily resting on the prosecution. The Court of Criminal Appeal held that this direction did not correctly represent the true position in law. It was held by the Court of Appeal that where, either by statute or at Common law, some matter is presumed against an accused person "unless the contrary is proved" the jury should be directed that the burden of proof on the accused is less than that required at the hands of the prosecution in proving the case beyond a reasonable doubt and that this burden may be discharged by evidence satisfying the jury of the probability of that which the accused is called on to establish. The ratio of this case was referred to with approval by this Court in *Harbhajan Singh v. The State of Punjab*². We are accordingly of the opinion that the burden of proof lying upon the accused under section 4 (1) of the Prevention of Corruption Act will be satisfied if the accused person establishes his case by a preponderance of probability and it is not necessary that he should establish his case by the test of proof beyond a reasonable doubt. In other words, the onus on an accused person may well be compared to the onus on a party in civil proceedings, and just as in civil proceedings, the Court trying an issue makes its decision by adopting the test of probabilities, so must a criminal Court hold that the plea made by the accused is proved if a preponderance of probability is established by the evidence led by him.

It is against this background of principle that we must proceed to examine the contention of the appellant that the charges under section 161, Indian Penal Code and section 5 (2) read with section 5 (1) (d) of the Prevention of Corruption Act have not been proved against him. It was argued by Mr. Sethi that the circumstances found by the High Court in their totality do not establish that the appellant accepted the amount of Rs. 10,000 as illegal gratification and not as a loan. It was also argued for the appellant that he had adduced sufficient evidence to show that the amount was really given to him as a loan by Ram Lal Kapoor. Having examined the findings of both the lower Courts, we are satisfied that the appellant has not proved his case by the test of preponderance of probability and the lower Courts rightly reached the conclusion that the amount was taken by the appellant not as a loan but as illegal gratification. It has been found by the High Court that Ram Lal Kapoor was not likely to lend a sum of Rs. 10,000 to the appellant without getting a formal document executed. It is not suggested by the appellant that he executed a hand-note in favour of Ram Lal Kapoor. There was a suggestion that he granted a receipt for Rs. 10,000 to Ram Lal Kapoor but the High Court rejected the case of the appellant on this point. The High Court has observed that, in the first instance, the appellant did not make a statement with regard to the receipt as soon as the amount was recovered from him. It was only after he was taken to Mardan Singh's place that he made a belated statement that the amount was advanced to him by Ram Lal Kapoor as a loan and he had granted a receipt. Mr. Sethi contended that it was the duty of the District Magistrate and the Senior Superintendent of Police to have made a search of the whole bungalow of Ram Lal Kapoor for the alleged receipt and the failure of these two officers to make the search should be taken to prove the appellant's case regarding the grant of the alleged receipt. We do not accept the submission of the learned Counsel as correct. The High Court has remarked that the statement of the appellant was highly belated and the District authorities were justified

1. L.R. (1943) 1 K.B. 607.

2. A.I.R. 1966 S.C. 97.

in not making a search and ransacking the whole bungalow of Ram Lal Kapoor for the recovery of the alleged receipt. It was then contended on behalf of the appellant that no *panchnama* was prepared by the District Magistrate or the Senior Superintendent of Police who recovered the money from the appellant. It was also stated that no independent witness was summoned to be present at the time of the search. It was pointed out that the District Magistrate is related to Sidh Gopal and it was suggested by Mr Sethi that the evidence of the District Magistrate, of the Senior Superintendent of Police and of Sidh Gopal should not have been accepted by the High Court as true. But all the circumstances have been taken into account by the High Court in discussing the testimony of these witnesses and ordinarily it is not permissible for the appellant to reopen conclusions of fact in this Court, especially when both the lower Courts have agreed with those conclusions which relate to the credibility of witnesses who have been believed by the trial Court which had the advantage of seeing them and hearing their evidence. It was then contended by the appellant that the High Court has taken into account the statement of Ram Lal Kapoor made in a departmental proceedings in coming to a conclusion regarding the guilt of the appellant. We do not think there is any justification for this argument. The High Court has properly held that the evidence of Ram Lal Kapoor dated 16th December, 1952—Exhibit P-11—was not admissible and has excluded it from its consideration in discussing the guilt of the appellant. It is true that in setting out the history of the case the High Court has referred to the statement of Ram Lal Kapoor but that does not mean that the High Court has used the statement of Ram Lal Kapoor for the purpose of convicting the appellant in the present case. It was also contended by Mr. Sethi on behalf of the appellant that the statements—Exhibits P-3 and P-4—should have been excluded from consideration. It was contended that these statements were made by the appellant to the District Magistrate after the recovery of the money and were hit by the provisions of section 162 of the Criminal Procedure Code. On behalf of the respondent Mr. Desai said that these statements are admissible because they were made to the District Magistrate and not to a police officer and were not during the course of investigation because the First Information Report was lodged on 13th September, 1951 at 8-30 p.m. long after the statements were made. We do not consider it necessary to express any concluded opinion as to whether Exhibits P-3 and P-4 are admissible but even if they are excluded from consideration there is sufficient evidence to support the conviction of the appellant on the charges under section 161, Indian Penal Code and section 5 (2) read with section 5 (1) (d) of the Prevention of Corruption Act.

It was also submitted by Mr. Sethi that the evidence of Sidh Gopal should not have been accepted by the High Court. It was pointed out that the appellant had received the letter of District Magistrate—Exhibit P-1 on 5th September, 1951 and it was, therefore, not likely that the appellant should have contacted Ram Lal Kapoor and Sidh Gopal on the 18th or 19th August, 1951. There is, however, evidence, in this case that Bhola Nath who was a salesman of M/s Mannulal Sidh Gopal was arrested in August, 1951 on the report of the appellant and Sidh Gopal apprehended that he would also come under the clutches of the law and his licences may also possibly be cancelled. In any event, this is a question regarding the credibility of Sidh Gopal and it is not open to the appellant to contest the finding of the lower Courts with regard to the credibility of that witness in this appeal.

Lastly, Mr. Sethi submitted that the appellant was 66 years old and the offence was committed in 1951 and legal proceedings have protracted for 15 years. Mr. Sethi, therefore, prayed that the sentence imposed on the appellant may be reduced. We are unable to accept this argument. We do not consider that the sentence is excessive in the circumstances of the case.

For the reasons already expressed, we hold that there is no merit in this appeal which is accordingly dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—K. N. WANCHOO, J. C. SHAH AND S. M. SIKRI, JJ.

Biswambhar Roy (deceased) by his Legal representatives .. Appellants*

v.

Girindra Kumar Paul (deceased) by his Legal representatives .. Respondents.

Assam Non-Agricultural Urban Areas Tenancy Act (XII of 1955) section 5 (1) (a)—*Lessee of land building permanent structures "for residential or business purposes"*—*If structures should be for his own use to entitle him to acquire rights of permanent tenant.*

Section 5 (1) (a) of Assam Non-Agricultural Urban Areas Tenancy Act merely requires that the permanent structure must be one adopted for residential or business purposes. To read the expression "permanent structure on the land of the tenancy for residential or business purposes" as meaning permanent structure on the land of the tenancy constructed by the tenant for his own residential or business purpose is to add words which are not in the section. The protection of section 5 (1) (a) extends to a tenant who has constructed on the land obtained on lease permanent structures, which are adopted for use for residential or business purposes and by letting out the structures the tenant does not forfeit the protection conferred by the statute. The structure does not cease to be one for residential or business purposes when it is let out nor does the lessee cease to be in possession of the land by letting out the structures.

Appeal by Special Leave from the Judgment and Decree dated the 26th June, 1959 of the Assam High Court in Letters Patent Appeal No. 1 of 1959.

N. C. Chatterjee, Senior Advocate (*D. N. Mukherjee*, Advocate with him), for Appellants.

Sarjoo Prasad, Senior Advocate (*K. P. Gupta*, Advocate with him), for Respondents.

The Judgment of the Court was delivered by

Shah, J.—Biswambar Roy—predecessor-in-interest of the appellants—was granted on 20th February, 1928, a lease for ten years 1335 B. S. to 1344 B. S. at an annual rental of Rs. 75 in respect of a plot of land, part of Dag No. 3615 in the town of Silchar, District Cachar in the State of Assam. Biswambar Roy constructed on the land buildings some for residential use, and others as warehouses. On the expiry of the period of the original lease, Biswambar Roy obtained a fresh lease in respect of a part of the land for ten years—*Baisakh* 1345 B. S. to *Chaitra* 1354 B. S.—at an annual rental of Rs. 70 under an instrument dated 22nd February, 1938.

The respondents purchased the interest of the landlords in the land and instituted on 3rd August, 1951 an action in the Court of the Sadar Munsiff, Silchar, against Biswambar Roy for a decree for vacant possession of the land. The suit was decreed by the Munsiff. Biswambar Roy appealed to the Subordinate Judge Silchar. During the pendency of the appeal, the Non-Agricultural Urban Areas Tenancy Act XII of 1955, enacted by the Assam Legislature was brought into force. Biswambar Roy claimed protection from eviction under section 3 of Act XII of 1955. The Subordinate Judge held that Biswambar Roy had acquired under section 5 (1) (a) of the Act the rights of a permanent tenant, since he had constructed within the period prescribed permanent structures for residential or business purposes. He accordingly reversed the decree passed by the trial Court and dismissed the suit. Against that decree, an appeal was preferred to the High Court of Assam. Deka, J., held that Biswambar Roy could not claim the protection of section 5 (1) (a) of the Act, since he had let out to tenants the buildings constructed on the land. In the view of the learned Judge, by the use of the expression "for residential or business purposes" in section 5 (1) (a) it is intended that buildings constructed by the tenant should be utilized by the tenant himself for his own residence or for carrying on business and that it is not the intention of the Legislature that third persons should be protected by section 5

30th March, 1966.

from eviction from those structures. An appeal under the Letters Patent from that judgment was heard by C P Sinha, C J, and Mehrotra, J. The learned Judges differed. Sinha, C J, was of the view that permanent structures constructed by Biswambar Roy conformed to the description "residential or business purposes" and Biswambar Roy became under Act XII of 1955 a permanent tenant thereof and was not liable to be evicted except for non payment of rent. With that view Mehrotra, J did not agree. He held that a tenant who obtains land on lease for erecting a structure thereon not for his own residential or business purposes but for letting out to others does not build 'a permanent structures on the land of the tenancy for residential or business purposes', and may not claim protection under section 5 (1) (a). Since there was no majority concurring in the Judgment agreeing or reversing the decree appealed from, under section 98 (2) of the Code of Civil Procedure the appeal was ordered to be dismissed. Against the decree passed by the High Court, with Special Leave, this appeal is preferred.

This Court has held that section 5 of Assam Act XII of 1955 has retrospective operation. *Rafiquenessa v Lal Bahadur Chettri and others*¹, and the only question to be determined in this appeal is whether a tenant qualifies for protection under section 5 of the Act only after building permanent structures on the land of the tenancy if he occupies them for his own residential or business purposes. The material part of the section reads

"(1) Notwithstanding anything in any contract or in any law for the time being in force—

(a) Where under the terms of a contract entered into between a landlord and his tenant whether before or after the commencement of this Act, a tenant is entitled to build and has in pursuance of such terms actually built within the period of five years from the date of such contract a permanent structure on the land of the tenancy for residential or business purposes or where a tenant not being so entitled to build has actually built any such structure on the land of the tenancy for any of the purposes aforesaid with the knowledge and acquiescence of the landlord the tenant shall not be ejected by the landlord from the tenancy except on the ground of non payment of rent."

Protection under the first part of section 5 (1) (a) may be claimed by a tenant if three conditions co exist, (i) under the terms of the contract of tenancy the tenant is entitled to build on the land of the tenancy, (ii) that pursuant to such liberty he has actually built within the period of five years from the date of the contract a permanent structure on the land of the tenancy, and (iii) that the permanent structure is for residential or business purposes. The first two conditions are fulfilled in this case. But the learned Judges of the High Court disagreed on the fulfillment of the third condition, they differed as to the true meaning of the expression "a permanent structure". * * * for residential or business purposes". In the view of Sinha, C J, under the Act the character of the structure is determinative and not personal use by the tenant. Mehrotra, J, held that the permanent structure must be for residential or business purposes of the tenant. We are unable to agree with the view taken by Mehrotra, J, because the Legislature has not, in conferring rights of permanent tenancy, either expressly or by implication enacted any such qualification as is suggested by the learned Judge. The section merely requires that the permanent structure must be one adapted for residential or business purposes. If the structure is not adapted to such purposes, the protection of section 5 (1) (a) will not be available. To read the expression 'permanent structure on the land of the tenancy for residential or business purposes' as meaning permanent structure on the land of the tenancy constructed by the tenant for his own residential or business purposes is to add words which are not found in the section.

It was urged on behalf of the landlords that it could not have been the intention of the Legislature to confer by section 5 (1) (a) protection upon sub-tenants. It was said that a sub-tenant is not a tenant within the meaning of section 3 (g) of the Act, and he cannot claim protection from eviction under section 5 (1) (a). In our judgment, the argument is wholly misconceived. Protection is conferred in terms by section 5 upon the tenant of the land and not upon the tenant of the buildings constructed upon the land. It is not necessary in this case to consider whether

by virtue of the definition of "tenant" in section 3 (g) of the Act which includes a person who derives his title from a tenant, a sub-tenant of the land is entitled to protection of section 5 (1) (a). In the present case, the tenant of the land has claimed protection. By merely letting the premises constructed on the land obtained by him on lease, the tenant does not cease to be in possession of the land. The relation between the landlord and the tenant of the land continues to subsist until it is lawfully determined. Possession of the land obtained by the tenant remains his even after he has let out the building constructed by him, and a building constructed by the tenant for use as residential or business purposes does not cease to be one for residential or business purposes when it is let out.

We therefore agree with the view taken by Sinha, C.J., that the protection of section 5 (1) (a) extends to a tenant who has constructed on the land obtained on lease permanent structures which are adapted for use for residential or business purposes and by letting out the structures the tenant does not forfeit the protection conferred by the statute.

The appeal is therefore allowed and the decree passed by the High Court vacated and the plaintiffs' suit dismissed. The appellants who are the representatives of the tenant will be entitled to their costs in this Court. There will be no order as to costs in the High Court.

K.S.

Appeal allowed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—K. SUBBA RAO, V. RAMASWAMI AND J. M. SHELAT, JJ.

Ghanshiam Das

.. Appellant.*

v.

Debi Prasad and another

.. Respondents.

U.P. Zamindari Abolition and Land Reforms Act (I of 1951), section 9—"Building"—Meaning of—Brick kiln which is a mere pit without walls or roof—If a "building" under section 9.

The word "building" has not been defined in the U.P. Zamindari Abolition and Land Reforms Act (I of 1951) and must therefore be construed in its ordinary grammatical sense unless there is something in the context or object of the statute to show that it is used in a special sense different from its ordinary grammatical sense. The existence of a roof is not always necessary for a structure to be regarded as a building. Residential buildings ordinarily have roofs but there can be a non-residential building for which a roof is not necessary. A large stadium or an open-air swimming pool constructed at a considerable expense would be a building as it is a permanent structure and designed for a useful purpose. The question as to what is a "building" under section 9 of the U.P. Act (I of 1951) must always be a question of degree—a question depending on the facts and circumstances of each case.

A brick kiln which has no walls and no roof, which is a mere pit dug in the ground with some bricks by its sides would not be a "building" within the meaning of that term in section 9 of the U.P. Act (I of 1951).

Appeals by Special Leave from the Judgment and Decree dated the 24th October, 1960, of the Allahabad High Court in Second Appeals Nos. 2510 and 2511 of 1957 respectively.

S.P. Sinha, Senior Advocate (*M.I. Khowaja*, Advocate, with him), for Appellant (In both the Appeals).

J.P. Goyal, Advocate, for Respondents (In both the Appeals.)

The Judgment of the Court was delivered by

Ramaswami, J.—The question of law involved in these appeals is whether the disputed brick kiln on plots Nos. 596 and 597 in Mauza Sarwat Pargana and District

11th March, 1966.

Muzaffarnagar and leased out to the appellant is a "building" within the meaning of section 9 of the U P Zamindari Abolition and Land Reforms Act (U P Act I of 1951)

The respondents are the owners of a brick kiln located on the two plots Nos 596 and 597 in Mauza Sarwat, Pargana and District Muzaffarnagar. They leased out the brick kiln to the appellant under a registered lease deed dated 29th December, 1950. The lease was to take effect from 1st January, 1951, and terminate on 30th September, 1953. The rent was fixed at Rs 41 per mensem payable annually in the month of October. The rent for the period 1st October, 1952 to 30th September, 1953, remained due against the appellant. The respondents filed a suit (No 1125 of 1953) in the Court of Munsif Muzaffarnagar for the recovery of Rs 492 being arrears of rent from 1st October 1952 to 30th September, 1953. The suit was contested by the appellant who pleaded that after the passing of the U P Zamindari Abolition and Land Reforms Act (U P Act I of 1951)—hereinafter called the 'Act'—the plots of land had vested in the State of U P under section 6 of the Act with effect from 1st July, 1952, and the respondents were, therefore, not entitled to claim any rent from the appellant. By his judgment dated 12th February, 1955, the Additional Munsif, Muzaffarnagar held that the brick kiln did not vest in the State and as it occupied only 1/3rd of the total area of the land, the respondents were entitled to a decree for 1/3rd of the rent claimed. The Munsif accordingly granted a decree for a sum of Rs 164 and dismissed the balance of the claim of the respondents. Against the judgment of the Additional Munsif both the parties filed appeals before the District Judge. Both the appeals were disposed of by the Civil Judge of Muzaffarnagar by a common judgment dated 19th August, 1957. It was held by the Additional Civil Judge that the brick kiln could not be regarded as a "building" within the meaning of section 9 of the Act and the entire area of the two plots Nos 596 and 597 had vested in the State. The Additional Civil Judge accordingly allowed the appellant's appeal and dismissed the appeal of the respondents. The net result was that the suit of the respondents for areas of rent was dismissed as a whole. Against the judgment of the Additional Civil Judge the respondents filed two Second Appeals Nos 2510 and 2511 of 1957 to the High Court. The High Court held that the brick kiln was a "building" within the meaning of section 9 of the Act and the title to the two plots of land did not vest in the State and the respondents acquired the rights of statutory tenants under section 9 of the Act and they had a right to demand rent from the appellant under the terms of the lease. The High Court accordingly allowed both the Second Appeals and granted a decree to the respondents for the entire amount of rent claimed.

Section 4 of the Act deals with the acquisition of the interests of intermediaries. The section provides as follows

4 (1) As soon as may be after the commencement of this Act the State Government may, by notification declare that as from a date to be specified all estates situate in Uttar Pradesh shall vest in the State and as from the beginning of the date so specified (hereinafter called the date of vesting) all such estates shall stand transferred to and vest, except as hereinafter provided, in the State free from all encumbrances.

(2) It shall be lawful for the State Government if it so considers necessary to issue from time to time the notification referred to in sub-section (1) in respect only of such area or areas as may be specified and all the provisions of sub-section (1) shall be applicable to and in the case of every such notification.

Section 6 (a) sets out the consequences of the vesting of an estate in the State. Section 6 (a) reads as follows

6 When the notification under section 4 has been published in the Gazette then notwithstanding anything contained in any contract or document or in any other law for the time being in force and save as otherwise provided in this Act the consequences as hereinafter set forth shall, from the beginning of the date of vesting ensue in the area to which the notification relates namely—

(a) all rights title and interest of all the intermediaries—

(i) in every estate in such area including land (cultivable or barren) grove land forest whether within or outside village boundaries trees (other than trees in village abadi holding or grove), fisheries tanks ponds water-channels ferries pathways abadi sites, bazars and melas other than

hats, bazars, and melas held upon land to which clauses (a) to (c) of sub-section (1) of section 18 apply and,

(ii) in all sub-soil in such estate including rights, if any, in mines and minerals, whether being worked or not ;

shall cease and be vested in the State of Uttar Pradesh free from all encumbrances ;

Section 9 of the Act states :

"9. All wells, trees in abadi and all buildings situate within the limits of an estate, belonging to or held by an intermediary or tenant or other person, whether residing in the village or not, shall continue to belong to or be held by such intermediary, tenant or person, as the case may be, and the site of the wells or the buildings with the area appurtenant thereto shall be deemed to be settled with him by the State Government on such terms and conditions as may be prescribed."

The word "building" has not been defined in the Act and must, therefore, be constructed in its ordinary grammatical sense unless there is something in the context or object of the statute to show that it is used in a special sense different from its ordinary grammatical sense. In the Websters New International Dictionary the word "building" has been defined as follows :

"That which is built specie : (a) as now generally used a fabric or edifice, framed or constructed designed to stand more or less permanently and covering a space of land for use as a dwelling, store house, factory, shelter for beasts or some other useful purpose. Building in this sense does not include a mere wall, fence, monument, hoarding or similar structure though designed for permanent use where it stands, nor a steamboat, ship or other vessel of navigation."

From this definition it does not appear that the existence of a roof is always necessary for a structure to be regarded as a building. Residential buildings ordinarily have roofs but there can be a non-residential building for which a roof is not necessary. A large stadium or an open-air swimming pool constructed at a considerable expense would be a building as it is a permanent structure and designed for a useful purpose. The question as to what is a "building" under section 9 of the Act must always be a question of degree—a question depending on the facts and circumstance of each case. As Blackburn, J. observed in *R. v. Neath Canal Navigation* ;¹

"The masonry on the sides of a canal is not sufficient to constitute it a 'building'. A London street, though paved and faced with stonework, would yet be 'land' ; whilst the Holborn Viaduct would be a 'building'."

The question for determination in the present case, therefore, is whether the kiln leased out to the appellant is a "building" within the meaning of section 9 of the Act. It has been found by the first appellate Court that the brick kiln has no site and is not a roofed structure. It was a mere pit with some bricks by its sides. It is also admitted in this case that there was no structure standing on the Bhatta. Upon these facts, it is clear that the brick kiln has no walls and no roof but it is a mere pit dug in the ground with bricks by its side. In the circumstances, we are of the opinion that the brick kiln leased out to the appellant, in the present case, is not a "building" within the meaning of section 9 of the Act. It follows, therefore, that the title to both the plots Nos. 596 and 597 along with the brick kiln vested in the State Government with effect from 1st July, 1952, and the respondents are not entitled to claim any rent from the appellant for the period from 1st October, 1952 to 30th September, 1953.

For the reasons expressed, we hold that Suit No. 1125 of 1953 filed by the respondents should be dismissed and these appeals must be allowed with costs.

V.K.

Appeals allowed.

THE SUPREME COURT OF INDIA

(Civil Appellate Jurisdiction)

PRESENT —K N WANCHOO, J C SHAH, AND S M SIKRI, JJ

Gyasi Ram

.. Appellant*

v

Brijbhushandas alias Nathelal and others

.. Respondents

Civil Procedure Code (V of 1908) Order 34 rules 7 and 8—Preliminary decree for redemption—Appeal and application for stay—Conditional on undertaking to pay 6 per cent increase in interest during the period of stay—Deposit of amount due under the preliminary decree—Additional interest due under the stay order not deposited—Deposit proper

A suit by the mortgagor for redemption was decreed and the usual preliminary decree in terms of Order 34 rule 7 was passed fixing the principal due and the amount of interest due up to a certain date as also the time for deposit of the said sums together with interest at 3 per cent per annum, on such deposit a final decree will be passed in his favour and on default the mortgagee will be entitled to a decree for foreclosure. On an application for stay of the direction to deposit in the appeal preferred to the High Court it was ordered that the stay will issue if he undertook to pay the interest at 9 per cent during the period of stay and the undertaking was given. On the dismissal of the appeal the plaintiff deposited the amount due as per the directions of the preliminary decree before any final decree was passed prohibiting him from redeeming the property. On the objection of the mortgagee, additional sums were also deposited later (sums due in respect of increased rate of interest due under the stay order) but still short of Rs. 88 or thereabout. The High Court in Second Appeal held the deposit was made before the final decree in the suit though beyond the date fixed in the preliminary decree but the amount deposited was still short and confirmed the final decree (for foreclosure) of the trial Court.

On appeal against the said decree

Held, under Order 34 rule 7 (i) (c) (i) and (ii) what the appellant has to deposit to entitle him to the final decree for redemption was the amount due under the preliminary decree and also "the amount adjudged due in respect of subsequent costs, charges, expenses and interest."

It is not in dispute that the amount so due had been deposited before the passing of any final decree as required by Order 34, rule 8 (i) and only a small sum of Rs. 88 or so was short and that too in respect of the undertaking for the stay. That amount so due arose out of an independent order—on the stay petition—and was not incorporated in the preliminary decree confirmed by the High Court while dismissing the appeal, it cannot be considered as due in respect of 'subsequent costs or charges'. Further even the shortage has been made up long before decision of the High Court.

The appellant is entitled to a final decree for redemption.

Appeal by Special Leave from the Judgment and Decree dated the 16th March, 1963, of the Madhya Pradesh High Court in Second Appeal No. 86 of 1962

S V Gupte, Solicitor General of India, (*Rameshwar Nath*, *S N Andley*, *P I Vohra* and *Mahinder Narain*, Advocates of *M/s Rajinder Narain & Co.*, with him), for Appellant

A K Sen, Senior Advocate (*R Gopalakrishnan*, Advocate, with him), for Respondent No. 1

The Judgment of the Court was delivered by

Wanchoo, J—This is an appeal by Special Leave against the judgment of the Madhya Pradesh High Court and arises in the following circumstances. The appellant brought a suit for redemption of certain mortgaged property. A preliminary decree was passed in the suit on 3rd February, 1954. It specified the amount due as principal and the amount due as interest up to a certain date. It also provided that future interest was to be paid at three per cent per annum on a certain sum from that date till the date of realisation. Parties were to bear their own costs. Further the

decree provided for payment of the amount due on or before 15th July, 1954, or within such time as might be extended. It also provided that if payment was made within the time limited under Order 34, rule 7 (1) (c) of the Code of Civil Procedure, final decree would be passed. In the alternative it was provided that if the deposit was not made, the respondent would be entitled to apply for passing of a final decree praying that the right of the appellant to redeem the mortgaged property be debarred.

There were appeals by both parties from this preliminary decree to the High Court. In the meantime the appellant had prayed for extension of time and the trial Court had extended time for making payment upto 15th August, 1954. About the same time, the appellant applied to the High Court praying that the order requiring him to deposit the decretal amount by 15th August, 1954, be stayed till the disposal of the appeal by the High Court. On this application, the High Court passed an order on 26th July, 1954. This order provided that if the appellant gave an undertaking to pay nine per cent. per annum interest instead of three per cent. per annum during the period of stay, the order of the trial Court directing the appellant to deposit the decretal amount by 15th August, 1954, would be stayed. Thereupon the appellant gave an undertaking to the trial Court on 7th August, 1954, that he would pay nine per cent. per annum simple interest instead of three per cent. per annum during the period of stay. In consequence the order of stay passed by the High Court came into force and no deposit was made by 15th August, 1954. On 16th October, 1958, the High Court dismissed both the appeals and the preliminary decree stood confirmed.

On 20th March, 1959, the appellant applied to the trial Court for permission to deposit the sum of Rs. 42,204-5-0. On 27th March, 1959, the trial Court permitted the appellant to deposit the amount but made it clear that this did not amount to any extension of time for making the deposit, and the question whether the deposit was made within time would be decided after hearing both parties. Notice was also issued to the respondent on the same date. On 28th March, 1959, the appellant deposited the amount. On 8th April, 1959, the respondent appeared and objected that the amount due was not Rs. 42,204-5-0 but Rs. 46,882-6-6 and therefore the deposit was short by a sum over Rs. 4,000. Thereupon the appellant deposited a further sum of Rs. 4,590 on 9th April, 1959 and prayed for a final decree in his favour. The trial Court held on 18th April, 1959, that the deposit was made beyond time and therefore directed that a final decree for foreclosure in favour of the respondent be drawn up. The appellant then went in appeal to the District Judge. The Additional District Judge who heard the appeal rejected the memorandum of appeal as insufficiently stamped. The appellant then filed a revision before the High Court. The High Court allowed the revision on 22nd July, 1961, and remanded the appeal to the Additional District Judge for decision on the merits. On 23rd March, 1962, the Additional District Judge allowed the appeal holding on the basis of Order 34, rule 8 that as the amount had been paid before the final decree was passed, it was within time. Consequently the Additional District Judge ordered that a final decree be drawn up in favour of the appellant. It may be noticed that it was also contended before the Additional District Judge that the amount deposited was short by Rs. 88-1-0. The Additional District Judge pointed out that this was not made a ground of attack in the trial Court. In any case he held that the amount which had to be deposited was as required by the preliminary decree and that the same had certainly been deposited. We may add that it is not in dispute between the parties that if the amount to be deposited is to be in accordance with the preliminary decree, the appellant has deposited that amount, rather more. The shortage has occurred because for the period of stay the High Court had ordered the payment of an extra six per cent per annum interest and it is with respect to that interest that the shortage has occurred.

The respondent then went in Second Appeal to the High Court. The High Court agreed with the Additional District Judge and held that in view of Order 34, rule 8 (1) the deposit made on 9th April, 1959, before the final decree was passed on 18th April, 1959, was within time, even though the money might have been deposited

after the time fixed under Order 34, rule 7. But the High Court also took the view that the mortgagor appellant had to deposit the entire amount due on the date of the deposit and as there was a shortage of Rs 88-1-0 the entire amount had not been deposited and in consequence no final decree could be passed in favour of the appellant. In the result the High Court set aside the order of the Additional District Judge and restored the order of the trial Court passing a decree for foreclosure in favour of the respondent. Thereupon the appellant obtained Special Leave from this Court and that is how the matter has come before us.

The only question raised on behalf of the appellant is that he had deposited the amount which was strictly due under the preliminary decree and something more. The shortage was only on account of the sum due as a result of the stay order passed by the High Court by which he was required to pay six per cent per annum more as interest for the duration of the stay. It is urged that this amount could not be taken into account in considering the question whether the appellant had deposited the entire amount due under the preliminary decree. We are of opinion that there is force in this contention and the appeal must succeed. Under Order 34, rule 8 (1) the mortgagor can deposit all amounts due under Order 34, rule 7 (1) before the final decree debarring him from all rights to redeem is passed. Order 34, rule 7 (1) lays down what a preliminary decree should contain and we are in the present case concerned with clauses (b) and (c) thereof. In this case the preliminary decree had declared the amount due upto a certain date towards principal and interest and had also provided for three per cent per annum interest on a certain sum from that date and had directed as required by clause (c) of Order 34, rule 7 (1) that if the mortgagor plaintiff paid in Court the amount found before a certain date a final decree in his favour would be passed. The preliminary decree also laid down that if payment was not made within the time fixed a final decree for foreclosure in favour of the defendant mortgagee would be passed. Now under Order 34, rule 7 (1) (c) (i) and (ii) what the appellant had to deposit was the amount found under the preliminary decree and also "the amount adjudged due in respect of subsequent costs, charges, expenses and interests". It is not in dispute, as we have already indicated that the appellant paid the amount found due under the preliminary decree and also the subsequent interest as provided in the decree. Only there was a shortage in the extra amount he had undertaken to pay as extra interest at the rate of six per cent per annum for the period of stay. The question is whether this amount can be said to be within the words "the amount adjudged due in respect of subsequent costs, charges expenses and interests". We are of opinion that this extra amount which was to be paid on account of the undertaking of the appellant for the purpose of stay cannot come within the words "in respect of subsequent costs, charges, expenses and interests". It is not in dispute that the High Court dismissed the appeal of the appellant in 1958 and confirmed the preliminary decree and that the amount due on account of the undertaking to pay extra interest at the rate of six per cent per annum for the period of stay was not included by the High Court in the preliminary decree. This amount arose out of an independent order of stay and though the appellant was bound to pay it in view of his undertaking, it was not made a part of the amount due under the preliminary decree. Nor can it be said that it was due in respect of subsequent costs, charges, expenses and interests. Besides such subsequent costs, charges, expenses and interests have to be adjudged before the mortgagor is asked to deposit the amount and it is not in dispute that no adjudgment as to any subsequent costs, charges, expenses and interests was made. So in order that a final decree may be passed in favour of the appellant, he had to carry out the terms of the preliminary decree and it is not in dispute that he had carried out the terms of that decree and he had to pay nothing on account of subsequent charges, costs, expenses and interests, for nothing was adjudged in respect of these. Nor as we have said already can the amount due as extra interest on the basis of the undertaking given by the appellant for the period of stay be considered to be of the nature of subsequent costs, charges, expenses and interests mentioned in Order 34, rule 7 (1) (c) (i) and (ii).

It is however urged that on this view there would be no way to enforce the appellant's undertaking to pay extra interest for the period of stay. We do not think so. It would in our opinion be in order for the Court to insist before it passed the final decree that the appellant honours his undertaking. But that is not to say that this amount due under an independent order of the High Court in connection with stay became part of the amount due under the preliminary decree or could be considered to be "subsequent costs, charges, expenses and interests". We may add that the shortage in question was made good by the appellant soon after the order of the Additional District Judge and long before the judgment of the High Court. As we have come to the conclusion that this amount due on account of the undertaking given by the appellant in the matter of stay cannot be taken to be part of the amount due under the preliminary decree, it must be held that the appellant was entitled to a final decree in his favour. We therefore allow the appeal, set aside the order of the High Court and restore the order of the Additional District Judge. The respondent will be entitled to withdraw the amount deposited by the appellant including the amount deposited on 21st April, 1962, on the conditions in that order. In the circumstances however we pass no order as to costs throughout.

K.G.S.

Appeal allowed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—P. B. GAJENDRAGADKAR, *Chief Justice*, K. N. WANCHOO, M. HIDAYATULLAH, V. RAMASWAMI AND P. SATYANARAYANA RAJU, JJ.

The State of Jammu and Kashmir and others

.. *Appellants**

v.

Caltex (India) Ltd.

.. *Respondent.*

Constitution of India (1950), Article 286 (2)—Jammu and Kashmir Motor Spirit (Taxation of Sales) Act (2005), section 3—Scope—"Retail sales of motor spirit" in the course of inter-State trade during January, 1955 to May, 1959—Property in the goods sold passing inside the State of Jammu and Kashmir—Levy of sales tax under section 3 of Jammu and Kashmir Act—Validity.

Sales Tax Laws Validation Act (VII of 1956)—Scope of.

The Director-General of Supplies, Delhi entered into a contract with the respondent, the General Manager, Caltex India (Ltd.) at Bombay for the supply of petrol to the State Farm at Nandpur located in the State of Jammu and Kashmir. In pursuance of this contract the respondent directed its depot at Pathankot situated in the Punjab State to supply petrol to the Nandpur Farm. The procedure adopted was as follows. The officer in charge of the Nandpur Farm placed indents with the Pathankot depot for supply of a specified quantities of petrol to the Farm and on receipts of the indents, the Pathankot depot transported petrol in its own tank-lorries to Nandpur and delivered the petrol which was measured and approved by the indenting officer at Nandpur Farms and thereafter the petrol was delivered to the Nandpur Farm through pumps which belonged to the respondent. The price of petrol so supplied was paid to the respondent at Delhi by the Director-General Supplies. The Petrol Taxation Officer at Srinagar considered that sales of petrol to Nandpur Farm were liable to be taxed under section 3 of the Jammu and Kashmir Motor Spirit (Taxation of Sales), Act (2005) and for the period January, 1955 to May, 1959 assessed the respondent to tax accordingly. On the question of the propriety of this order.

Held, that the transactions of sale made between the parties were unquestionably in the course of inter-State trade; that the levy of tax under the Jammu and Kashmir Act in respect of the sales which took place during the period 1st January 1955, to 6th September, 1955, was valid: but that the levy in respect of rest of the period was invalid in view of the prohibition contained in Article 286 (2) of the Constitution of India.

The levy in respect of the sales during 1st January, 1955 to 6th September, 1955 was valid because the Sales Tax Laws Validation Act (VII of 1956) removed the ban contained in Article 286 (2) retrospectively for the period between 1st April, 1951 to 6th September, 1955.

It is true that the Sales Tax Laws Validation Act by itself did not empower any State to levy any tax on sales or purchases in the course of inter State trade but it merely liberated Sales Tax Acts of several States from the fetter imposed by Article 286 (2) of the Constitution and left the States to operate on its own terms and that therefore if there was no law in a State empowering the levy of a tax on sales or purchases in the course of inter State trade or commerce the State could not derive any advantage from the Sales Tax Laws Validation Act.

But the transactions of sale between 1st January, 1955 to 6th September, 1955 in the present case were retail sales of motor spirit within the meaning of section 3 of the Jammu and Kashmir Motor Spirit (Taxation of Sales) Act and the property in the petrol sold having passed inside the State of Jammu and Kashmir they were liable to be taxed under that provision. The fact that the respondent had no storage depot or place of business within the State of Jammu and Kashmir or did not hold any licence for storing of petrol within that State will not affect its liability to pay the tax. The charging section of the Jammu and Kashmir Act does not require that for the purpose of assessment of tax the assessee should have his place of business or his storage depot within the State of Jammu and Kashmir. Nor is it a requirement of the section that the assessee should hold a licence of a retail dealer under the Act.

It would not be correct to say that the taxing authorities are not entitled to levy sales tax for the period from 1st January 1955 to 6th September 1955 because the assessment was one composite whole relating to the entire period from January 1955 to May 1959 and the assessment which was bad in part was infected throughout and must be treated as invalid. The assessment for the period from 1st January 1955 to 6th September, 1955 can easily be separated and dissected from the assessment of the rest of the period and enforced as such.

Appeal from the Judgment and Order dated the 10th July, 1962, of the Jammu and Kashmir High Court in L. P. Appeal No. 4 of 1962.

S V Gupta, Solicitor General of India, *Raja Jaswant Singh*, Advocate General for the State of Jammu and Kashmir and *N S Bindra*, Senior Advocate, (*R H Dhebar* and *R N Sachin*, Advocates, with him), for Appellant Nos 1 and 2.

M C Setalvad, Senior Advocate (*D N Gupta*, Advocate, with him), for Respondent.

The Judgment of the Court was delivered by

Ramaswami, J—This appeal is brought on a certificate against the judgment of the Division Bench of the High Court of Jammu and Kashmir at Srinagar dated 10th July, 1962, holding that the respondent is not liable to pay sales tax for the period from January, 1955 to May, 1959 under the Jammu and Kashmir Motor Spirit (Taxation of Sales) Act, 2005 (1948 A.D.).

The Director General of Supplies, Delhi entered into a contract with General Manager, Caltex India (Ltd) at Bombay (hereinafter called the respondent for the supply of petrol, H.S.D. and power kerosene to the State Mechanized Farm at Nandpur located in the State of Jammu and Kashmir. In pursuance of this contract the respondent directed its Depot at Pathankot situated in the Punjab State to supply petrol to the Nandpur Farm. The procedure adopted was as follows. The Officer in charge of the Nandpur Farm placed orders with the Pathankot Depot for supply of specified quantities of petrol to the farm and on receipt of the orders the Pathankot Depot transported the petrol in its own tank lorries to Nandpur and delivered the petrol to the Farm. The petrol was measured by means of dipping rods and approved by the indenting officer at Nandpur Farm and thereafter the petrol was delivered to the Nandpur Farm through pumps which belonged to the respondent. The price of petrol so supplied was paid to the respondent at Delhi by the Director General of Supplies. The Petrol Taxation Officer at Srinagar considered that the sales of petrol to Nandpur Farm were liable to be taxed under the Jammu and Kashmir Motor Spirit (Taxation of Sales) Act, 2005 and called upon the respondent to furnish returns of sales between 1952 to 1959. The respondent, however, furnished returns only for the period January, 1955, to May, 1959. On the basis of the returns the Petrol Taxation Officer assessed the respondent to pay sales tax to the extent of Rs. 39,619.75 in respect of sales of petrol from January, 1955, to May, 1959. The respondent there

after moved the High Court under section 103 of the Constitution of Jammu and Kashmir for grant of a writ to quash the assessment of sales tax and to restrain the State of Jammu and Kashmir and the Petrol Taxation authorities (hereinafter called the appellants) from levying the tax. It was contended on behalf of the respondent that the sales tax could not be imposed as the sales took place in the course of inter-State trade and commerce. Syed Murtaza Fazl Ali, J., held that the respondent was liable to pay sales tax in respect of the sales which took place during the period January, 1955 to September, 1955. Regarding the rest of the period of assessment, the learned Judge held that the appellants were not entitled to levy tax and accordingly issued a writ restraining the appellants from levying the tax for the period from October, 1955 to May, 1959. The appellants took the matter in Letters Patent appeal and the respondent also filed cross-objection with regard to the liability to tax for the period from January, 1955 to September, 1955. The Division Bench dismissed the appeal in Letters Patent and allowed the cross-objection of the respondent, holding that the appellants were not entitled to levy sales-tax for the entire period from January, 1955 to May, 1959 and accordingly quashed the assessment of sales-tax dated 3rd October, 1960.

It is necessary, at this stage, to indicate the legislative development in the State of Jammu and Kashmir which provides the setting for the questions to be investigated in this case.

Article 286 of the Constitution, as it was originally enacted, read as follows :

“(1) No law of a State shall impose, or authorise the imposition of, a tax on the sale or purchase of goods where such sale or purchase takes place—

(a) outside the State ; or

(b) in the course of the import of the goods into, or export of the goods out of, the territory of India.

Explanation.—For the purpose of sub-clause (a), a sale or purchase shall be deemed to have taken place in the State in which the goods have actually been delivered as a direct result of such sale or purchase for the purpose of consumption in that State, notwithstanding the fact that under the general law relating to sale of goods the property in the goods has by reason of such sale or purchase passed in another State.

(2) Except in so far as a Parliament may by law otherwise, provide, no law of a State shall impose, or authorise the imposition of, a tax on the sale or purchase of any goods where such sale or purchase takes place in the course of inter-State trade or commerce :

Provided that the President may by order direct that any tax on the sale or purchase of goods which was being lawfully levied by the Government of any State immediately before the commencement of this Constitution shall, notwithstanding that the imposition of such tax is contrary to the provisions of this clause, continue to be levied until the thirty-first day of March, 1951.

(3) No law made by the Legislature of a State imposing, or authorising the imposition of, a tax on the sale or purchase of any such goods as have been declared by Parliament by law to be essential for the life of the community shall have effect unless it has been reserved for the consideration of the President and has received his assent.”

Article 286 therefore imposes four bans upon the legislative power of the States. Clause (1) prohibited every State from imposing or authorising the imposition of, a tax on outside sales and on sales in the course of import into or export outside the territory of India. By clause (2) the State was prohibited from imposing tax on the sale of goods where such sale took place in the course of inter-State trade or commerce. But the ban could be removed by legislation made by the Parliament. By clause (3) the Legislature of a State was incompetent to impose or authorise imposition of a tax on the sale of any goods declared by the Parliament by law to be essential for the life of the community unless the legislation was reserved for the consideration of the President and had received his assent. But Article 286 of the Constitution did not apply to the State of Jammu and Kashmir till 14th May, 1954 because the Constitution (Application to Jammu and Kashmir) Order, 1950 made by the President of India on 26th January, 1950 excepted Article 286 from its applicability to the State of Jammu and Kashmir. Reference, in this connection, may be made

to the Second Schedule to the Constitution (Application to Jammu and Kashmir) Order, 1950, relevant excerpt from which is reproduced below

THE SECOND SCHEDULE

(See paragraph 3)

<i>Provisions of the Constitution applicable</i>	<i>Exceptions</i>	<i>Modifications</i>
Part XII	Articles 264 and 265, Clause (2) of Art 267 Articles 268 to 281, Clause (2) of Art 283, Articles 286 to 291 293 295 296 and 297	<ol style="list-style-type: none"> Article 266 shall apply only in so far as it relates to the Consolidated Fund of India and the public account of India Articles 282 and 284 shall apply only in so far as they relate to the Union or the public account of India Articles 298 299 and 300 shall apply only in so far as they relate to the Union or the Government of India

But Article 286 was applied to the State of Jammu and Kashmir by the Constitution (Application to Jammu and Kashmir) Order, 1954 which came into force on 14th day of May, 1954. In *The Bengal Immunity Company, Ltd v State of Bihar*¹, this Court held that the operative provisions of the several parts of Article 286 namely, clause (1) (a), clause (1) (b), clause (2) and clause (3) were intended to deal with different topics and one cannot be projected or read into another and therefore the *Explanation* in clause (1) (a) cannot legitimately be extended to clause (2) either as an exception or as a proviso thereto or read as curtailing or limiting the ambit of clause (2). This Court further held that until the Parliament by law, made in exercise of the powers vested in it by clause (2) of Article 286, provides otherwise no State may impose or authorise the imposition of any tax on sales or purchases of goods when such sales or purchases take place in the course of inter State trade or commerce, and therefore the State Legislature could not charge inter State sales or purchases until the Parliament had otherwise provided. The judgment of the Court in *The Bengal Immunity Company's case*¹ was delivered on 6th September, 1955. The President issued the Sales Tax Laws Validation Ordinance 1956, on 30th January, 1956 the provisions of which were later embodied in the Sales Tax Laws Validation Act, 1956. By this Act notwithstanding any judgment, decree or order of any Court, no law of a State imposing or authorising the imposition of, a tax on the sale or purchase of any goods where such sale or purchase took place in the course of inter-State trade or commerce during the period between the 1st day of April, 1951 and the 6th day of September, 1955, shall be deemed to be invalid merely by reason of the fact that such sale or purchase took place in the course of inter State trade or commerce, and all such taxes levied or collected or purported to have been levied or collected during the aforesaid period shall be deemed always to have been validly levied or collected in accordance with law. The Parliament thus removed the ban contained in Article 286 (2) of the Constitution retrospectively but limited only to the period between 1st April, 1951 and 6th September, 1955. All transactions of sale, even though they were inter State could for that period be lawfully charged to tax. But Article 286 (2) remained operative after 6th September, 1955 till the Constitution was amended by the Constitution (Sixth Amendment) Act, i.e., 11th September, 1956. By the amendment, the *Explanation* to clause (1) of Article 286 was deleted and for clauses (2) and (3) the following clauses were substituted

“(2) Parliament may by law formulate principles for determining when a sale or purchase of goods takes place in any of the ways mentioned in clause (1).”

(3) Any law of a State shall, in so far as it imposes, or authorises the imposition of, a tax on the sale or purchase of goods, declared by Parliament by law to be of special importance in inter-State trade or commerce, be subject to such restrictions and conditions in regard to the system of levy, rates and other incidents of the tax as Parliament may by law specify.”

By clause (2) of Article 286 as amended, Parliament was authorised to formulate principles for determining when a sale or purchase of goods takes place in any of the ways mentioned in clause (1), namely, outside the State or in the course of the import into, or export out of the territory of India. By the Constitution (Sixth Amendment) Act, Parliament was entrusted with power under Article 269 (3) to formulate principles for determining when a sale or purchase of goods takes place in the course of inter-State trade or commerce; and to effectuate the conferment of that power in the Seventh Schedule, Entry 92-A was added in the First List and Entry 54 in the Second List was amended. The Parliament enacted, in exercise of that power, the Central Sales Tax Act, LXXIV of 1956 to formulate principles for determining when a sale or purchase of goods takes place in the course of inter-State trade or commerce or outside a State or in the course of import into or export from India, and to provide for the levy, collection and distribution of taxes on sales of goods in the course of inter-State trade or commerce and to declare certain goods to be of special importance in inter-State trade or commerce, etc. Article 286 as amended by the Constitution (Sixth Amendment) Act, 1956, was applied to the State of Jammu and Kashmir on 16th January, 1958 by the Constitution (Application to Jammu and Kashmir) Amendment Order, 1958. The Central Sales Tax Act (LXXIV of 1956) was enacted by Parliament on 21st December, 1956 but it was applied to the State of Jammu and Kashmir on 23rd March, 1958 by Act V of 1958.

The questions presented for determination in this appeal are: (1) whether sales tax could be imposed on the respondent for the period from October, 1955 to May, 1959 in view of the prohibition contained in Article 286 (2) of the Constitution as it stood before its amendment, (2) whether sale tax could be validly levied on sales taking place between 1st January, 1955 to 6th September, 1955 in view of the lifting of the ban under the Sales Tax Laws Validation Act (VII of 1956).

As regards the first question, it is admitted by the parties that petrol was transported from Pathankot in the State of Punjab to Nandpur in the State of Jammu and Kashmir under the contract of sale. The petrol was kept in storage at a depot of the respondent at Pathankot and it was carried in the trucks of the respondent from Pathankot and delivered to the Nandpur farm in the State of Jammu and Kashmir. The price of the petrol supplied was paid to the respondent at Delhi by the Director-General of Supplies. Upon these facts it is manifest that there was movement of goods from the State of Punjab to the State of Jammu and Kashmir under the contract of sale and there was completion of sale by the passing of property and the delivery of the goods to the purchaser. As pointed out by Venkatarama Ayyar, J., in the *Bengal Immunity Company case*¹:

“A sale could be said to be in the course of inter-State trade only if two conditions concur: (1) A sale of goods, and (2) a transport of those goods from one State to another under the contract of sale. Unless both these conditions are satisfied, there can be no sale in the course of inter-State trade.”

In the present case, both these conditions have been satisfied and the transactions of sale made between the parties were unquestionably in the course of inter-State trade. Indeed, the Solicitor-General on behalf of the appellants did not seriously challenge the finding of the High Court on this point.

We proceed to consider the next question, viz., whether the respondent was liable to pay sales tax for the period from 1st January, 1955 to 6th September, 1955 in view of the lifting of the ban under the Sales Tax Validation Act, 1956.

1. (1955) S.C.J. 672 : (1955) 2 M.L.J. (S.C.) 168 : (1955) 2 S.C.R. 603.

On behalf of the respondent Mr Setalvad put forward the argument that the Sales Tax Validation Act by itself did not empower any State to levy any tax on sales or purchases in the course of inter State trade but it merely liberated Sales Tax Acts of several States from the fetter imposed by clause (2) of Article 286 of the Constitution and left the State Act to operate in its own terms. It was submitted that if there was no law in a State empowering the levy of a tax on sales or purchases in the course of inter State trade or commerce, the State could not derive any advantage from the Sales Tax Validation Act. It was contended that the Explanation to Article 286 (1) (a) of the Constitution did not confer any taxing power on any State Legislature. On the contrary it was intended to place a limitation on the States' taxing power and therefore the mere lifting of the ban under clause (2) of Article 286 did not enable the State to impose the tax on sales in the course of inter State trade and such levy of tax could be made only when the taxing statute of the State expressly provides for it. In our opinion, the argument of Mr Setalvad is well founded. The question, therefore, arises whether the Jammu and Kashmir Motor Spirit (Taxation of Sales) Act, 2005 (hereinafter called the Act), applies to the sales of petrol made by the respondent between 1st January, 1955 to 6th September, 1955 and whether the appellants can validly assess the respondent to sales tax with regard to these transactions.

The preamble of the Act states that it is expedient to provide for the levy of a tax on the retail sale of motor spirit. Section 2 (g) of the Act defines 'retail sale' to mean a sale by a 'retail dealer' of any motor spirit to a consumer or to any other person for any purpose other than resale. Section 2 (f) defines 'retail dealer' to mean any person who, on commission or otherwise, sells any motor spirit to a consumer or to any other person for any purpose other than resale or keeps any motor spirit for sale to consumers or to any other persons for purposes other than resale. Under section 2 (h) of the Act the words "sale" and "sell" include exchange, barter and also the consumption of motor spirit by the 'retail dealer' himself. Section 3 deals with the imposition of tax and reads as follows:

'3 There shall be levied and paid to the Government on all retail sales of motor spirit a tax at the rate of four annas for each imperial gallon of motor spirit or at such other rate as the Government may prescribe from time to time.'

Section 6 of the Act deals with the licensing of the retail dealers and states that after the expiry of a period of two months from the commencement of the Act no person shall carry on business as a retail dealer unless he is in possession of a valid licence. Section 7 relates to the procedure for grant of licence. Section 7 (4) states as follows:

'No licence under this Act shall be granted to any person who does not hold a licence for the storage of dangerous petroleum under the Petroleum Act 1898 and if any such licence granted under that Act is cancelled, suspended or is not renewed any licence granted under this Act to the holder thereof shall be deemed to be cancelled, suspended or not renewed as the case may be.'

It was contended on behalf of the respondent that no tax could be levied under the Act unless the assessee has his place of business or storage of motor spirit within the State of Jammu and Kashmir. It was pointed out that no retail dealer was permitted to carry on business as a retail dealer of motor spirit unless he holds a licence for storage of petroleum under the State Petroleum Act. It is admitted that the respondent had no storage depot or place of business within the State of Jammu and Kashmir at the material time. It is also conceded that the respondent did not hold any licence for storage of petrol within the State. Mr Setalvad therefore contended that the appellants were not authorised to levy sales tax under the provisions of the Act. We are unable to accept this contention as correct. The charging section—section 3—authorises the Government to levy tax on "all retail sales of motor spirit" at the rate of four annas for each imperial gallon of motor spirit or at such other rate as the Government may prescribe from time to time. The charging section does not require that for the purpose of assessment of tax the assessee should have his place of business or his storage depot within the State of Jammu and Kashmir. Nor is it a requirement of the section that the assessee should hold a licence of a retail dealer.

under the Act. The provisions in regard to licence contained in sections 6 and 7 deal with the machinery of collection and it is not permissible, in our opinion, to construe the language of section 3 of the Act with reference to sections 6 and 7 or to place any restriction on the scope and effect of the charge of tax in the context of these sections. We may, in this context, refer to the provisions of section 10 of the Act which states :

"10. Whoever contravenes the provisions of section 6 shall be punishable with fine which may extend to one thousand rupees or to a sum double the amount of tax due in respect of the sale of any motor spirit conducted by or on behalf of such person, whichever is greater."

It is evident from the section that a person who trades in petrol without taking out a licence under section 6 of the Act is liable to pay double the amount of tax due from him. In other words, the requirement of section 6 is only a matter of machinery and does not affect the liability of the person who trades in petrol to pay tax in accordance with the charging section. It follows therefore that the respondent will be liable to pay sales tax if it is shown that it has made retail sales of motor spirit within the meaning of section 3 of the Act. This takes us to the question whether the transactions of sale between 1st January, 1955 to 6th September, 1955 were "retail sales of motor spirit" within the meaning of section 3 of the Act. As observed earlier, the procedure for supply of petrol was that the officer-in-charge of the Nandpur farm placed indents on the Pathankot depot of the respondent for supplies of specified quantities of petrol to the farm. On receipt of the indent the Pathankot depot transported the petrol in its own tank-lorries to Nandpur within the State of Jammu and Kashmir and decanted the petrol in its own underground tanks where it was measured by means of dipping rods and approved by the indenting officer and was then delivered to Nandpur farm. In this state of facts it was contended by the Solicitor-General that the property in the petrol passed to Nandpur farm inside the State of Jammu and Kashmir. It was submitted that the sales were, therefore, liable to be taxed under section 3 of the Act for the period from 1st January, 1955 to 6th September, 1955 when the ban was removed. On behalf of the respondent Mr. Setalvad said that there was appropriation of the goods to the contract at the bulk depot of the respondent at Pathankot and therefore the property of the goods passed to the Nandpur farm at Pathankot outside the State of Jammu and Kashmir. No such argument appears to have been advanced on behalf of the respondent before the High Court which decided the case on the assumption that there was appropriation of the goods to the contract at Srinagar when the petrol was transferred from the tank-lorries of the respondent for delivery to Nandpur farm and measured by means of dipping rods and approved by the indenting officer. The question as to passing of title of goods is essentially a question of fact and we must deal with the present case on the same basis as the High Court has done, viz., that there was passing of title inside the State of Jammu and Kashmir. We accordingly hold that section 3 of the Act applies to transactions of sale of petrol made by the respondent for the period from 1st January, 1955 to 6th September, 1955 and assessment of sales tax made by the taxing authorities for this period is legally valid.

It was lastly contended by the Solicitor-General that the High Court was in error in taking the view that the taxing authorities were not entitled to levy sales tax for the period from 1st January, 1955 to 6th September, 1955, because the assessment was one composite whole relating to the entire period from 1st January, 1955 to May, 1959, and the assessment which was bad in part was infected throughout and must be treated as invalid. In our opinion, the criticism of the Solicitor-General on the point is well-founded and must be accepted as correct. It is true that there was one order of assessment for the period from 1st January, 1955 to May, 1959 but the assessment can be easily split up and dissected and the items of sale can be separated and taxed for different periods. In reaching the conclusion that the entire assessment was invalid the High Court has relied on the decision of the Judicial Committee in *Bennett and White (Calgary) Ltd. v. Municipal District of Sugar City No. 51* in which Lord Reid observed as follows at page 816 of the Report :

"When an assessment is not for an entire sum but for separate sums dissected and earmarked each of them to a separate assessable item a Court can sever the items and cut out one or more along with the sum attributed to it while affirming the residue. But where the assessment consists of a single undivided sum in respect of the totality of property treated as assessable, and when one component (not dissimilable as *de minimis*) is on any view not assessable and wrongly included, it would seem clear that such a procedure is barred, and the assessment is bad wholly."

But the principle has no application in the present case because the sales tax is imposed in ultimate analysis, on receipts from individual sales or purchases of goods effected during the entire period and it is possible to separate the assessment of the receipts derived from the sales for the period from 1st January, 1955 to 6th September, 1955 and to allow the taxing authorities to enforce the statute with respect to the sales taking place in this period and also prevent them by grant of a writ from imposing the tax with regard to sales for the exempted period. In other words, the assessment for the period from 1st January, 1955 to 6th September, 1955 can be separated and dissected from the assessment of the rest of the period and the High Court was in error in holding that the assessment for the entire period was invalid *in toto*. The view that we have expressed is borne out by the decision of this Court in *The State of Bombay v. The United Motors (India), Ltd.*¹

For these reasons we allow this appeal in part and order that the respondent should be granted a writ in the nature of *mandamus* directing the appellants not to realise sales tax with regard to transactions of sale between the period from 7th September, 1955 to May, 1959 but the respondent will not be entitled to any writ with regard to transactions of sale between 1st January, 1955 to 6th September, 1955. The appeal is accordingly allowed to this extent but the parties will bear their own costs.

V K.

Appeal partly allowed

THE SUPREME COURT OF INDIA

(Civil Appellate Jurisdiction)

PRESENT — P B GAJENDRAGADKAR, Chief Justice, K N WANCHOO,
M HIDAYATULLAH, V RAMASWAMI AND P SATYANARAYANA RAJU, JJ
Ramesh and another

Appellants*

v

Gendal Motilal Patni and others

Respondents

Constitution of India (1950) Articles 133 (1) and 226—Words "Civil Proceeding" in Article 133 (1)—Meaning of—Right of appeal under Article 133 (1)—If lies only against judgments decrees or final orders of High Court made in exercise of appellate or ordinary original civil jurisdiction—If unavailable against orders made in exercise of extraordinary original civil jurisdiction under Article 226—Order dismissing summarily a petition under Article 226—If and when amounts to "judgment, decree or final order"

Article 133 of the Constitution of India must cover all civil proceedings because no exception is indicated. The term "civil proceeding" has been held to include at least all proceedings affecting civil rights which are not criminal. The dichotomy between civil and criminal proceedings made by the civil law Jurists is apparently followed in Articles 133 and 134 and any proceeding affecting civil rights, which is not criminal in nature is civil. A petition under Article 226 of the Constitution for a writ to bring up a proceeding for consideration must be a civil proceeding if the original proceeding concerned civil rights. The contention that a proceeding commenced on an application for a writ cannot be regarded as a civil proceeding must therefore fail.

The submission that Article 133 (1), considered as a whole gives a right of appeal only against judgments decrees or final orders passed by the High Court in the exercise of either the appellate or ordinary original civil jurisdiction but not against a judgment decree or final order passed in the exercise of extraordinary original civil jurisdiction under Article 226 is not correct. Article 133 not only discards the distinction between appellate and original jurisdictions but deliberately uses words which are as wide as language can make them. The intention is not only to include all judgments decrees and final orders passed in the exercise of appellate and ordinary original civil jurisdictions but also to make the language wide enough to cover other jurisdictions under which civil rights

1 (1953) S.C.J. 393 (1953) I.M.L.J. 743 (1953) S.C.R. 1069 at 1097

* C.A. No. 950 of 1965

6th January, 1966

With C.M.P. No. 2180 of 1965

would come before the High Court for decision. The right of appeal to the Supreme Court is accordingly stated in general terms in Articles 132 and 133 and no exception not mentioned in them can be implied.

Nor would it be correct to say that an order dismissing summarily a petition under Article 226 cannot be regarded as a "judgment, decree or final order" for the purpose of filing an appeal under Article 133 (1). Under Article 226 the High Court does not hear an appeal or revision. A petition to the High Court invoking this jurisdiction is a proceeding quite independent of the original controversy. The controversy in the High Court, in proceedings arising under Article 226 ordinarily is whether a decision of or a proceeding before a Court or tribunal or authority should be allowed to stand or should be quashed, for want of jurisdiction or on account of errors of law apparent on the face of the record. A decision in the exercise of this jurisdiction, whether interfering with the proceeding impugned or declining to do so, is a final decision in so far as the High Court is concerned because it terminates finally the special proceeding before it. But it is not to be taken that any order will be a final order. The question will always arise what has the High Court decided and what is the effect of the order. If, for example, the High Court declines to interfere because all the remedies open under the law are not exhausted, the order of the High Court may not possess that finality which the Article contemplates. But the order would be final if the jurisdiction of a tribunal is questioned and the High Court either upholds it or does not. In either case the controversy in the High Court is finally decided. To judge whether the order is final in that sense it is not always necessary to correlate the decision in every case with the facts in controversy especially where the question is one of jurisdiction of the Court or tribunal. The answer to the question whether the order is final or not will not depend on whether the controversy is finally over but whether the controversy raised before the High Court is finally over or not. If it is, the order will be appealable under Article 133 (1) provided the other conditions are satisfied ; otherwise not.

In the instant case the question raised was whether the Commissioner had jurisdiction to set aside the discharge of a secured debt ordered by the Claims Officer under the M.P. Abolition of Proprietary Rights (Estates, Mahals and Alienated Lands) Act, 1950. His jurisdiction was challenged by proceedings under Article 226 of the Constitution of India. The High Court summarily dismissed the petition. In other words, it upheld the jurisdiction and in the circumstances it makes no difference whether the High Court pronounced a speaking order or not. The proceeding before the High Court was a civil proceeding and the order made by it was a final order. As the other requirements of Article 133 (1) were also satisfied the High Court was in error in refusing a certificate under Article 133 (1) to the petitioner in the writ petition.

Appeal by Special Leave from the Judgment and Order dated the 1st February, 1965 of the Bombay High Court (Nagpur Bench) at Nagpur in Miscellaneous (Civil) Application No. 13 of 1965 (with Application for dismissal of the Appeal for want of prosecution).

C. B. Agarwala, Senior Advocate (*B. R. L. Iyengar, G. L. Sanghi* and *A. G. Ratnaparkhi*, Advocates, with him), for Appellants.

M. S. Gupta, Advocate, for Respondent No. 1.

D. R. Prem, Senior Advocate (*B. R. G. K. Achar*, Advocate, with him), for Respondents Nos. 2 and 3.

The Judgment of the Court was delivered by

Hidayatullah, J.—This is an appeal by Special Leave against an order dated 1st February, 1965 of the High Court of Bombay (Nagpur Bench) in Miscellaneous Petition No. 13 of 1965 refusing a certificate under Article 133 (1) (a) or (b) of the Constitution. This certificate was asked by the appellants in respect of the order of the High Court dated 21st September, 1964 in Special Civil Application No. 471 of 1964. Both these orders summarily dismissed the respective petitions. Against the main order Special Leave Petition (Civil) No. 395 of 1965 has been filed but by an order of this Court dated 30th July, 1965, it has been kept pending *sine die* with liberty to bring it up for hearing after the disposal of the present appeal. This is because the appellants claim in this appeal that appeal lay as of right to this Court and the certificate was wrongly refused by the High Court. Before we discuss the question mooted before us we shall state the facts sufficient for the purpose.

On the passing of the Madhya Pradesh Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act, 1950, the appellants applied under section 19 (1) or

the Act for the determination of their debts, specifying the amounts and particulars of all secured debts and claims together with the names of the creditors. One such creditor, named by them, is Gendal Motilal Patni who is the first respondent. His debt was a mortgage debt originally but had resulted in a decree for Rs. 2,16,309. Patni objected that this had ceased to be a secured debt or secured claim for the application of section 17 (a) of the Abolition Act. The objection was taken under section 21.

The Claims Officer overruled the objection of Patni by an order dated 19th November, 1951. He held that although the debt had merged in a decree it remained a secured debt nevertheless and that as the amount was recoverable on the date of vesting the provisions of the Act were applicable to it. By another order of the same date the Claims Officer called upon Patni to file his statement of claim under section 22 of the Act. Patni did not file the statement but instead preferred an appeal against the main order before the former Madhya Pradesh Board of Revenue. The Board of Revenue held on 15th June, 1954 that the Claims Officer had no jurisdiction to determine the character of the debt and only the civil Court could decide this issue. In reaching this conclusion the Board followed a decision of the Nagpur High Court reported in *Ramkrishna v. Board of Revenue*¹.

Patni next moved the civil Court and the civil Court decided that the debt in question was a secured debt for the application of the Abolition Act. Patni appealed to the High Court but out of caution filed his statement of claim before Claims Officer on 23rd January, 1958. The ex proprietors (the appellants here) objected to the statement on the ground that it was out of time and asked that the claim be held discharged. The Claims Officer accepted the objection and discharged the claim by an order dated 24th December, 1962. Patni appealed to the Commissioner, Nagpur Division, Nagpur (Rev. Appeal No. 2/57/62/63) and by an order of 5th May, 1964 the order of the Claims Officer was set aside. The Commissioner pointed out that the decision of the Nagpur High Court earlier referred to was overruled in the subsequent case of the High Court reported in *Jethalal Bhawani Thaker v. Prabhakar Sadashiv Talatule*² and the Claims Officer had jurisdiction to pronounce on the character of the debt. The order of the Claims Officer of 19th November, 1951 was thus held to have revived but the claim could not be discharged as action under section 22 (1) had not been taken. The case was remanded to the Claims Officer for disposal according to law.

The appellants thereupon filed a petition under Articles 226 and 227 of the Constitution in the High Court of Bombay (Nagpur Bench) on the ground that the Commissioner had no jurisdiction to entertain and decide the appeal and that the Claims Officer had ordered the continuation of the proceedings and so the order of the Commissioner was wrong. The High Court summarily dismissed the petition by its first order dated 21st September, 1964 against which Special Leave Petition (Civil) No. 395 of 1965 has been filed. The appellants next applied for a certificate which was refused by order dated 1st February, 1965, impugned in the present appeal, and the question involved is whether the appellants were entitled to a certificate as of right under Article 133 (1) (a) or (b)?

This question falls to be considered under Article 133 of the Constitution. That Article reads

¹ 133 Appellate jurisdiction of Supreme Court in appeals from High Courts in regard to civil matters — (1) An appeal shall lie to the Supreme Court from any judgment, decree or final order in a civil proceeding of a High Court in the territory of India if the High Court certifies—

(a) that the amount or value of the subject matter of the dispute in the Court of first instance and still in dispute on appeal was and is not less than twenty thousand rupees or such other sum as may be specified in that behalf by Parliament by law; or

(b) that the judgment, decree or final order involves directly or indirectly some claim or question respecting property of the like amount or value; or

(c) that the case is a fit one for appeal to the Supreme Court ; and, where the judgment, decree or final order appealed from affirms the decision of the Court immediately below in any case other than a case referred to in sub-clause (c), if the High Court further certifies that the appeal involves some substantial question of law."

[Clauses (2) and (3) of Article 133 are not relevant].

Under sub-clauses (a) and (b) of clause (1) of this article an appeal lies on certificate of the High Court. That certificate may only be issued in cases in which the amount or value of the subject-matter of the dispute in the Court of first instance and still in dispute on appeal to the Supreme Court was or is not less than Rs. 20,000, or the judgment, decree or final order involves directly or indirectly some claim or question respecting property of the like amount or value. Sub-clause (c) is free from any monetary valuation, and under it a special certificate can be issued even in cases involving claims or questions respecting property less than Rs. 20,000 if the High Court considers the case as fit for appeal. Other considerations then apply which need not be considered here. The present appeal involves a consideration of sub-clauses (a) and (b) only, because, it is submitted, the certificate was claimable as of right.

There is, to begin with, no doubt that the amount or value of the subject-matter of the dispute in the High Court and still in dispute on appeal to this Court is well above Rs. 20,000. This attracts sub-clause (a). In any event, the decision of the High Court involves, directly or indirectly a claim above that amount and that attracts sub-clause (b). Mr. M. S. Gupta for the answering respondent does not rightly contest this fact. He submits that clause (1) of Article 133, considered as a whole, gives a right of appeal only against judgments, decrees or final orders passed by the High Court in the exercise of either the appellate jurisdiction or ordinary original civil jurisdiction (where a High Court possesses that jurisdiction under its Letters Patent) but not against a judgment, decree or final order passed in the exercise of extraordinary original civil jurisdiction under Article 226 of the Constitution. He further submits that an order dismissing summarily a petition under Article 226 of the Constitution is not a judgment, decree or final order from which an appeal can properly be brought under Article 133. Lastly, he submits that a proceeding commenced on an application for a writ is not a civil proceeding at all.

Article 133 must cover all civil proceedings because no exception is indicated. The question is whether the proceedings in the High Court can be described as civil proceedings. The High Court in the present case was invited to interfere by issuing writs of *certiorari* and prohibition against the reopening of the case in which the Claims Officer had discharged a debt due to the answering respondent. The revenue authorities in such matters act analogously to civil Courts, have a duty to act judicially, and pronounce upon the rights of parties. In the present case the Claims Officer purported to exercise a jurisdiction under which he could order the discharge of a debt which means the order affected the civil rights of the parties. The Commissioner's order reversing the order of the Claims Officer also affected the same civil rights of the parties. The proceedings before the revenue authorities thus were concerned with the civil rights of two contending parties. They were civil proceedings. The proceedings in the High Court must also be regarded as of the same nature. The term civil proceeding has been held in this Court to include, at least, all proceedings affecting civil rights, which are not criminal. The dichotomy between civil and criminal proceedings made by the Civil Law Jurists is apparently followed in Articles 133 and 134 and any proceeding affecting civil *i.e.*, private rights, which is not criminal in nature, is civil. This view was expressed recently by this Court in *S. A. L. Narayan Row and another, etc. v. Ishwarlal Bhagwandas and another, etc.*¹, Shah, J., speaking for the majority, first summarises all the provisions in the Constitution bearing upon appeals to this Court and after analysis, holds that the words "civil proceeding" are used in the widest sense, that in contradistinction to criminal proceedings they cover all proceedings which affect directly civil rights. A proceeding under Article 226 for a writ to bring up a proceeding for consideration must be a civil proceeding, if the original proceeding concerned civil rights. Here

1. (1965) 2 I.T.J. 264 : (1965) 2 S.C.J. 359.

the civil rights of the parties were directly involved and the proceeding before the High Court was thus a civil proceeding. The first requisite for the application of Article 133 (1) is thus satisfied.

The next question is what are the different kinds of decisions from which appeals lie under Article 133. Mr. Gupta's contention that under that article an appeal can only lie in respect of a judgment or decree or final order passed in the exercise of appellate or ordinary original civil jurisdiction but not of extraordinary original civil jurisdiction, is not right. He is apparently harking back to the provisos for appeal in sections 109 and 110 of the Code of Civil Procedure and inasmuch as appeals under those sections were available against judgments, decrees and final orders passed in the exercise of appellate or ordinary original civil jurisdictions only, he thinks, the same position continues still to obtain and judgments, decrees or final orders passed in the exercise of the extraordinary original civil jurisdictions are excluded. He seeks, in other words, to limit the opening words of Article 133 (1) by reference to the history of appeals to the Privy Council under sections 109 and 110 of the Code of Civil Procedure. In *Municipal Officer, Aden v. Abdul Karim*¹ this distinction in fact was made and the provisions of the amended Clause (40) of the Letters Patent of the Bombay High Court were called in aid. Mr. Gupta cannot avail himself of the same argument in view of the use of the words "any judgment, decree or final order in a civil proceeding of a High Court" in the opening part of Article 133 (1). Article 133 not only discards the distinction between appellate and original jurisdictions but deliberately used words which are as wide as language can make them. The intention is not only to include all judgments, decrees and orders passed in the exercise of appellate and ordinary original civil jurisdictions but also to make the language wide enough to cover other jurisdictions under which civil rights would come before the High Court for decision. The drafters of the Constitution were aware that a new jurisdiction was being conferred on the High Courts by Article 226 of the Constitution and proceedings before any Court or Tribunal within the jurisdiction of the High Court, including in appropriate cases before Government would be brought before the High Court and dealt with by issuing writs of *certiorari*, *mandamus* and prohibition. That the new jurisdiction would often result in decisions affecting civil, private rights must have been apparent and the need to provide for appeals to this Court from the determinations of the High Courts must have been equally obvious. The right of appeal to this Court is thus stated in general words in Articles 132 and 133 and no exception not mentioned in the articles can be implied.

Cases involving an interpretation of the Constitution are dealt with in Article 132. That article covers all cases in which a High Court certifies that any judgment, decree or final order of the High Court involves a substantial question as to the interpretation of the Constitution. A certificate under that article may issue in any civil, criminal or other proceeding, to bring to appeal a judgment, decree or final order of the High Court. The reference to "other proceedings" was considered necessary because there are certain proceedings, which are not strictly civil or criminal in nature, and they may yet involve the interpretation of the Constitution. Article 132 therefore, omits no decision if a substantial question as to the interpretation of the Constitution is necessary to be decided; provided, of course, that the decision in respect of which the certificate is asked or granted is "a judgment, decree or final order".

Article 133, on the other hand, provides for appeals against any judgment, decree or final order in a "civil proceeding". We have explained what is meant by a civil proceedings and have held that such proceedings must concern civil rights including those arising from status as well as contract. Once that test is satisfied the word "proceeding" is a word of very wide import. We have held that the proceeding in the High Court was a civil proceeding and although it was for the exercise of extraordinary original civil jurisdiction, the word "any" must take in a decision provided it is a judgment, decree or final order.

Mr. Gupta, however, submits that the order of the High Court was not a "judgment, decree or final order" and gives two reasons. He says that as the order said nothing about the merits of the controversy it cannot amount to the kind of determination which those words contemplate and that as it does not of its own force affect the rights of the parties or finally put an end to the controversy it cannot be regarded as final.

There is no doubt that the order must possess a finality for that is what the article itself says. It is also true that it has been held that an order is not a final order, unless it finally disposes of the rights of the parties and does not leave them to be determined in the ordinary way or as it is said that if the suit is still a live suit in which the rights of the parties have still to be determined, there is no finality and no appeal lies. Mr. Gupta has brought to our notice all the cases of the Judicial Committee and this Court in which this test has been applied.

The submissions of Mr. Gupta would have had considerable force if we were considering the exercise of appellate or revisional jurisdictions of the High Court and the whole of the controversy had not been decided by the High Court. An appeal and a revision is a continuation of the original suit or proceeding and the finality must therefore attach to the whole of the matter and the matter should not be a live one after the decision of the High Court if it is to be regarded as final for the purpose of appeal under Article 133.

We are concerned here with the exercise of extraordinary original civil jurisdiction under Article 226. Under that jurisdiction, the High Court does not hear an appeal or revision. The High Court is moved to intervene and to bring before itself, the record of a case decided by or pending before a Court or tribunal or any authority within the High Court's jurisdiction. A petition to the High Court invoking this jurisdiction is a proceeding quite independent of the original controversy. The controversy in the High Court, in proceedings arising under Article 226 ordinarily is whether a decision of or a proceeding before, a Court or tribunal or authority, should be allowed to stand or should be quashed, for want of jurisdiction or on account of errors of law apparent on the face of the record. A decision in the exercise of this jurisdiction, whether interfering with the proceeding impugned or declining to do so, is a final decision in so far as the High Court is concerned because it terminates finally the special proceeding before it. But it is not to be taken that any order will be a final order. There are orders and orders. The question will always arise what has the High Court decided and what is the effect of the order. If, for example, the High Court declines to interfere because all the remedies open under the law are not exhausted, the order of the High Court may not possess that finality which the article contemplates. But the order would be final if the jurisdiction of a tribunal is questioned and the High Court either upholds it or does not. In either case the controversy in the High Court is finally decided. To judge whether the order is final in that sense it is not always necessary to correlate the decision in every case with the facts in controversy especially where the question is one of jurisdiction of the Court or tribunal. The answer to the question whether the order is final or not will not depend on whether the controversy is finally over but whether the controversy raised before the High Court is finally over or not. If it is, the order will be appealable provided the other conditions are satisfied, otherwise not.

In the present case the question raised was whether the Commissioner had jurisdiction to set aside the discharge of the debt ordered by the Claims Officer. This jurisdiction was challenged by the proceedings under Article 226. The High Court summarily dismissed the petition. In other words, it upheld the jurisdiction and in the circumstances it makes no difference whether the High Court pronounced a speaking order or not. By its decision the High Court has finally decided the question of jurisdiction. It is obvious that if the High Court had decided to hold that there was no jurisdiction, the debt would have stood discharged. The order once again revived the debt. Now the order of the Commissioner was challenged on the ground of jurisdiction in a separate proceeding. The High Court decided to dismiss the petition and the order that was passed must be regarded as final for the purpose

of appeal to this Court. As the other requirements of the article were satisfied the High Court was in error in refusing the certificate in this case.

The appeal must therefore, succeed. The order dated 1st February, 1965, is set aside and the case will now go back to the High Court for disposal according to law. The first respondent shall bear the costs of the appellant.

Civil Miscellaneous Petition No. 2180 of 1965 was not pressed and is dismissed. There will be no order as to costs in this petition.

V K

Appeal allowed

THE SUPREME COURT OF INDIA

(Civil Appellate Jurisdiction)

PRESENT — P. B. GAJENDRAGADKAR, *Chief Justice*, K. N. WANCHOO,
V. RAMASWAMI and P. SATYANARAYANA RAJU, JJ.

Sheodan Singh

Appellant*

v

Daryao Kunwar

Respondent

Civil Procedure Code (V of 1908) section 11—Operation of bar of res judicata under—Conditions to be fulfilled—Two suits having common issues between same parties consolidated and decided by trial Court on merits—Two appeals one from each suit filed—One of the appeals dismissed on a preliminary ground—If amounts to appeal being heard and finally decided—Other appeal if gets barred by res judicata

A plain reading of section 11 of the Civil Procedure Code shows that to constitute a matter *res judicata* the following conditions must be satisfied, namely—

(i) the matter directly and substantially in issue in the subsequent suit must be the same matter which was directly and substantially in issue in the former suit.

Explanation 1 to section 11 shows that even if a suit was filed later it will be a former suit if it has been decided earlier.

(ii) the former suit must have been a suit between the same parties or between parties under whom they or any of them claim.

(iii) the parties must have litigated under the same title in the former suit.

(iv) the Court which decided the former suit must be a Court competent to try the subsequent suit.

Where the former suit filed in one Court has been transferred to another Court for trial it is the Court which decided the former suit whose jurisdiction to try the subsequent suit has to be considered and not the Court in which the former suit was filed.

(v) the matter directly and substantially in issue in the subsequent suit must have been heard and finally decided by the Court in the first suit.

Where a decision is given on the merits by the trial Court and the matter is taken in appeal and the appeal is dismissed on some preliminary ground like limitation or default in printing the records etc. thus confirming *in toto* the trial Court's decision on merits it must be held that such dismissal of the appeal amounts to the appeal itself being heard and finally decided on the merits and as such would operate as *res judicata* in a subsequent suit between the same parties. To hold otherwise would make *res judicata* impossible in cases where the trial Court decides the matter on merits but the appeal Court dismisses the appeal on some preliminary ground. Acceptance of such a proposition will mean that all that the losing party has to do to destroy the effect of a decision given by the trial Court on merits is to file an appeal and let that appeal be dismissed on some preliminary ground with the result that the decision given on merits also becomes useless as between the parties.

Thus where the trial Court decides on merits two suits consolidated and tried together between the same parties having common issues and there are two appeals therefrom and one of them is dismissed on some preliminary ground like limitation or default in printing the records etc. with the result that the trial Court's decision on the merits in that suit stands confirmed the decision of the appeal Court will operate as *res judicata* in the other pending appeal and section 11 Civil Procedure

Code would bar the hearing of that appeal. In such a case the result of the decision of the appeal Court is to confirm the decision of the trial Court given on merits and if that is so, the decision of the appeal Court will be *res judicata* whatever may be the reason for the dismissal. It would be a different matter, however, where the decision of the appeal Court does not result in the confirmation of the decision of the trial Court given on the merits, as for example, where the appeal Court holds that the trial Court had no jurisdiction and dismisses the appeal, even though the trial Court might have dismissed the suit on the merits.

Shankar Sahai v. Bhagwat Sahai, A.I.R. 1946 Oudh 33 and *Obedur Rahman v. Darbari Lal*, A.I.R. 1927 Lah. 1, Overruled.

Appeals by Special Leave from the Judgment and Decree dated the 30th November, 1962 of the Allahabad High Court in First Appeals Nos. 365 and 366 of 1951.

B. C. Misra and *M. V. Goswami*, Advocates, for Appellant.

J. P. Goyal and *Prayag Das*, Advocates, for Respondent.

The Judgment of the Court was delivered by

Wanchoo, J.—These are connected appeals by Special Leave against the judgment of the High Court of Allahabad and the only question raised herein is one of *res judicata*. They will be dealt with together. The appellant's father brought Suit No. 37 of 1950 against the respondent, Smt. Daryao Kunwar for a declaration that he was the owner of the properties in suit and for possession in the alternative. The appellant was also a party to the suit as a *pro forma* defendant. Since his father is dead, he has been substituted in his place. The case put forward in the plaint was that Harnam Singh was the uncle of the appellant's father. Ram Kishan was the adopted son of Harnam Singh and the respondent is his widow. The appellant and his father were living jointly with Harnam Singh and his adopted son Ram Kishan and on the deaths of Harnam Singh and his adopted son the appellant and his father became owners of the joint properties by survivorship; but the names of the widows of Harnam Singh and Ram Kishan were entered in revenue papers for their consolation, though they had no right or title to any part of the property in dispute. There were other allegations in the plaint with which we are however not concerned in the present appeals.

Shortly afterwards the appellant's father filed another Suit No. 42 of 1950 against the respondent and one other person claiming the price of the crops which stood on certain *sir* and *khudkashat* plots in two villages on the allegation that the respondent had cut and misappropriated the crops standing on these plots without having any right, title or interest therein. The respondent Smt. Daryao Kunwar contested both the suits. Her main defence was that there had been complete partition in the family as a result of which Harnam Singh and after him his adopted son Ram Kishan were the sole owners of their separated shares. After the death of Ram Kishan, the respondent inherited his entire property as his widow. Both these suits had been filed in the Court of the Civil Judge.

While these suits were pending, the respondent instituted two suits of her own Nos. 77 and 91 of 1950 against the appellant and his father. Suit No. 77 was for recovery of the price of her share of the crop grown on certain *sir* and *khudkashat* plots which had been cut and misappropriated by the appellant and his father. Suit No. 91 was also for a similar relief in respect of the respondent's share of crops grown on certain *sir* and *khudkashat* plots in another village which had also been cut and misappropriated by the appellant and his father. Her case was that the plots in question in both the villages belonged to the parties jointly and the crop was jointly sown by them and she was entitled to half of the said crops. Further in Suit No. 77 of 1950 she also claimed the relief of permanent injunction restraining the appellant and his father from letting out the said plots without her consent. These two suits were filed in the Court of the Munsif while suits filed by the appellant's father had been instituted in the Court of the Civil Judge. Subsequently by an order of the District Judge, the two suits filed by the respondent were transferred to the Court of

the Civil Judge. Thereafter all the four suits were consolidated and tried together by the Civil Judge with the consent of the parties. All these suits were disposed of by a common judgment but separate decrees were prepared in each suit. In all the suits five issues were common. In addition there were other issues in each case respecting the particular merits thereof. One of the common issues related to respective rights of the parties to the suit property. The finding of the Civil Judge on this issue was that Smt. Daryao Kunwar was entitled to the properties claimed by the appellant's father in his Suit No. 37 of 1950. The Civil Judge therefore dismissed that suit. Further in view of the finding on the question of title in Suit No. 37 of 1950, Suit No. 91 of 1950 was decreed in favour of the respondent. Further Suit No. 42 by the appellant's father was on the same finding decreed to the extent of half only. Suit No. 77 of 1950 was decreed also to the extent of half and a permanent injunction was granted in favour of the respondent Smt. Daryao Kunwar as prayed by her in that suit.

The appellant's father was aggrieved by these decrees. Consequently he filed two first appeals in the High Court. Appeal No. 365 of 1951 was against the dismissal of Suit No. 37 while Appeal No. 366 of 1951 was against the dismissal of Suit No. 42. The appellant's father also filed two appeals in the Court of the District Judge against the judgments and decrees in the suits filed by the respondent, Smt. Daryao Kunwar. Appeal No. 452 of 1951 was against the decree in Suit No. 77 while Appeal No. 453 of 1951 was against the decree in Suit No. 91. By an order of the High Court, the two appeals pending in the Court of the District Judge were transferred to the High Court. Thereafter Appeal No. 453 of 1951 arising out of Suit No. 91 was dismissed by the High Court on 9th October, 1953 as being time-barred while Appeal No. 452 of 1951 arising out of Suit No. 77 was dismissed by the High Court on 7th October, 1955 on the ground of failure of the appellant's father to apply for translation and printing of the record as required by the rules of the High Court. It may be mentioned that appeals Nos. 452 and 453 were given different numbers on transfer to the High Court, but it is unnecessary to refer to those numbers for present purposes.

After Appeals Nos. 452 and 453 had been dismissed, an application was made on behalf of the respondent, Smt. Daryao Kunwar, praying that first appeals Nos. 365 and 366 of 1951 be dismissed as the main question involved therein namely, title of Smt. Daryao Kunwar to the suit property had become final on account of the dismissal of the appeals arising out of Suits Nos. 77 and 91 of 1950. When this question came up for hearing before a learned Single Judge, the following question, namely—

Whether the appeal is barred by section 11 of the Code of Civil Procedure or by the general principles of *res judicata* as the appeals against the decisions in Suit Nos. 77 and 91 of 1951 were rejected and dismissed by this Court and those decisions have become final and binding between the parties.

was referred to a Full Bench for decision in view of some conflict between two Division Benches of that Court.

The Full Bench came to the conclusion that two matters were directly and substantially in issue in all the four suits, namely—(i) whether Harnam Singh and his adopted son Ram Kishan died in a state of jointness with the appellant and his father, and (ii) whether the property in suit was joint family property of Ram Kishan and the appellant's father. The decision of the Civil Judge on both these issues was against the appellant and his father and in favour of Smt. Daryao Kunwar. The Full Bench held that though there were four appeals originally before the High Court, two of them had been dismissed and the very same issues which arose in first appeals Nos. 365 and 366 had also arisen in those two appeals which had been dismissed. The Full Bench found further that the terms of section 11 of the Code of Civil Procedure were fully applicable and therefore the two first appeals Nos. 365 and 366 were barred by *res judicata* to the extent of the decision of the five issues which were common in four connected Appeals. In the result the Full Bench returned that answer to the question referred to it.

After this decision of the Full Bench the matter went back to the learned Single Judge for decision, who thereupon dismissed the appeals as barred by section 11 of the Code of Civil Procedure. The appellant then obtained Special Leave from this Court ; and that is how the matter has come up before us.

We may at the out-set refer to the relevant provisions of section 11 of the Code of Civil Procedure insofar as they are material for present purposes. They read thus :

"No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.

Explanation 1—The expression 'former suit' shall denote a suit which has been decided prior to the suit in question whether or not it was instituted prior thereto.

* * * * *

It is not necessary to refer to the other *Explanations*.

A plain reading of section 11 shows that to constitute a matter *res judicata*, the following conditions must be satisfied, namely—(i) The matter directly and substantially in issue in the subsequent suit or issue must be the same matter which was directly and substantially in issue in the former suit ; (ii) The former suit must have been a suit between the same parties or between parties under whom they or any of them claim ; (iii) The parties must have litigated under the same title in the former suit, (iv) The Court which decided the former suit must be a Court competent to try the subsequent suit or the suit in which such issue is subsequently raised ; and (v) The matter directly and substantially in issue in the subsequent suit must have been heard and finally decided by the Court in the first suit. Further *Explanation I* shows that it is not the date on which the suit is filed that matters but the date on which the suit is decided, so that even if a suit was filed later, it will be a former suit if it has been decided earlier. In order therefore that the decision in the earlier two appeals dismissed by the High Court operates as *res judicata* it will have to be seen whether all the five conditions mentioned above have been satisfied.

Four contentions have been urged on behalf of the appellant in this connection. They are—

(i) that title to property was not directly and substantially in issue in Suits Nos. 77 and 91 ;

(ii) that the Court of the Munsif could not try the Title Suit No. 37 of 1950 ;

(iii) that it cannot be said that appeals arising out of Suits Nos. 77 and 91 were former suits and as such the decision therein would be *res judicata* ;

(iv) that it cannot be said that the two appeals from Suits Nos. 77 and 91 which were dismissed by the High Court, one on the ground of limitation and the other on the ground of not printing the records, were heard and finally decided.

So it is contended that the conditions necessary for *res judicata* to arise under section 11 have not been satisfied and the High Court was in error in holding that its dismissal of the two appeals arising from Suits Nos. 77 and 91 amounted to *res judicata* so far as Appeals Nos. 365 and 366 were concerned.

Re (i).

The judgment of the Additional Civil Judge shows that there were five issues common to all the four suits, and the main point raised in these common issues was whether Harnam Singh and his adopted son Ram Kishan were joint with the appellant and his father and whether Ram Kishan died in a state of jointness with them. This main question was decided against the appellant and his father and it was held by the Additional Civil Judge that Harnam Singh and Ram Kishan were separate from the appellant and his father and that Ram Kishan did not die in a state of jointness with them. On this view of the matter, the Additional Civil Judge held that the respondent Smt. Daryao Kunwar, succeeded to Ram Kishan on his death and was entitled to the separated share of Ram Kishan and the appellant and

his father had no right to the property by survivorship. In the face of the judgment of the Additional Civil Judge which shows that there were five common issues in all the four suits, the appellant cannot be heard to say that these issues were not directly and substantially in issue in Suits Nos 77 and 91 also. Further this contention was not raised in the High Court and the appellant cannot be permitted to raise it for the first time in this Court. Besides the question whether these common issues were directly and substantially in issue in Suits Nos 77 and 91 can only be decided after a perusal of the pleadings of the parties. In the paper book as originally printed, the appellant did not include the pleadings at all. Later he filed copies of the plaints only with an application. Even now we have not got copies of written statements and replications, if any, of Suits Nos 77 and 91. In the circumstances we must accept from the fact that the judgment of the Additional Civil Judges shows that these five issues were raised in Suits Nos 77 and 91, that they were directly and substantially in issue in those suits also and did arise out of the pleadings of the parties. We therefore reject the contention that issues as to title were not directly and substantially in issue in Suits Nos 77 and 91.

Re (ii)

There is no substance in the contention that the Munsif before whom Suits Nos 77 and 91 were filed could not try the Title Suit No 37 and therefore, there can be no question of *res judicata*, as the Title Suit No 37, assuming it to be a subsequent suit, could not be tried by the Munsif's Court which tried the former suit. It is true that Suits Nos 77 and 91 were filed in the Munsif's Court but they were transferred to the Court of the Additional Civil Judge and in actual fact were tried by the Additional Civil Judge. It is the Court which decides the former suit whose jurisdiction to try the subsequent suit has to be considered and not the Court in which the former suit may have been filed. Therefore, though Suits Nos 77 and 91 may have been filed in the Munsif's Court, they were transferred to the Court of the Additional Civil Judge and were decided by him. There is no dispute that the Court which decided the former suits, namely, Suits Nos 77 and 91 (assuming them to be former suits) had jurisdiction to try the Title Suit No 37. The contention that the Munsif before whom Suits Nos 77 and 91 were filed, could not try the subsequent Suit No 37 has therefore no force in the circumstances of the present litigation.

Re (iii)

Then it is urged that all the four suits were consolidated and decided on the same day by the same judgment and there can therefore be no question that Suits Nos 77 and 91 were former suits and thus the decision as to title in those suits became *res judicata*. It is not in dispute that the High Court's decision in the appeals arising from Suits Nos 77 and 91 was earlier. Reliance in this connection is placed on the decision of this Court in *Nahars v Shankar*¹. That case however has no application to the facts of the present case, because there the suit was only one which was followed by two appeals. The appeals were heard together and disposed of by the same judgment though separate decrees were prepared. An appeal was taken against one of the decrees. In those circumstances this Court held that as there was only one suit, it was not necessary to file two separate appeals, and the fact that one of the appeals was time barred did not affect the maintainability of the other appeal and the question of *res judicata* did not at all arise. In the present case there were different suits from which different appeals had to be filed. The High Court's decision in the two appeals arising from Suits Nos 77 and 91 was undoubtedly earlier and therefore the condition that there should have been a decision in a former suit to give rise to *res judicata* in a subsequent suit was satisfied in the present case. The contention that there was no former suit in the present case must therefore fail.

Re (iv)

This brings us to the main point that has been urged in these appeals, namely that the High Court had not heard and finally decided the appeals arising out of

Suits Nos. 77 and 91. One of the appeals was dismissed on the ground that it was filed beyond the period of limitation while the other appeal was dismissed on the ground that the appellant therein had not taken steps to print the records. It is therefore urged that the two appeals arising out of Suits Nos. 77 and 91 had not been heard and finally decided by the High Court, and so the condition that the former suit must have been heard and finally decided was not satisfied in the present case. Reliance in this connection is placed on the well-settled principle that in order that a matter may be said to have been heard and finally decided, the decision in the former suit must have been on the merits. Where, for example, the former suit was dismissed by the trial Court for want of jurisdiction, or for default of plaintiff's appearance, or on the ground of non-joinder of parties or misjoinder of parties or multifariousness, or on the ground that the suit was badly framed, or on the ground of a technical mistake, or for failure on the part of the plaintiff to produce probate or letters of administration or succession certificate when the same is required by law to entitle the plaintiff to a decree, or for failure to furnish security for costs, or on the ground of improper valuation or for failure to pay additional Court-fee on a plaint which was undervalued or for want of cause of action or on the ground that it is premature and the dismissal is confirmed in appeal (if any) the decision not being on the merits would not be *res judicata* in a subsequent suit. But none of these considerations apply in the present case, for the Additional Civil Judge decided all the four suits on the merits and decided the issue as to title on merits against the appellant and his father. It is true that the High Court dismissed the appeals arising out of Suits Nos. 77 and 91 either on the ground that it was barred by limitation or on the ground that steps had not been taken for printing the records. Even so the fact remains that the result of the dismissal of the two appeals arising from Suits Nos. 77 and 91 by the High Court on these grounds was that the decrees of the Additional Civil Judge who decided the issue as to title on merits stood confirmed by the order of the High Court. In such a case, even though the order of the High Court may itself not be on the merits, the result of the High Court's decision is to confirm the decision on the issue of the title which had been given on the merits by the Additional Civil Judge and thus in effect the High Court confirmed the decree of the trial Court on the merits, whatever may be the reason for the dismissal of the appeals arising from Suits Nos. 77 and 91. In these circumstances though the order of the High Court itself may not be on the merits, the decision of the High Court dismissing the appeals arising out of Suits Nos. 77 and 91 was to uphold the decision on the merits as to issue of title and therefore it must be held that by dismissing the appeals arising out of Suits Nos. 77 and 91 the High Court heard and finally decided the matter for it confirmed the judgment of the trial Court on the issue of title arising between the parties and the decision of the trial Court being on the merits the High Court's decision confirming that decision must also be deemed to be on the merits. To hold otherwise would make *res judicata* impossible in cases where the trial Court decides the matter on merits but the appeal Court dismisses the appeal on some preliminary ground thus confirming the decision of the trial Court on the merits. It is well-settled that where a decree on the merits is appealed from, the decision of the trial Court loses its character of finality and what was once *res judicata* again becomes *res sub judice* and it is the decree of the appeal Court which will then be *res judicata*. But if the contention of the appellant were to be accepted and it is held that if the appeal Court dismisses the appeal on any preliminary ground, like limitation or default in printing, thus confirming *in toto* the trial Court's decision given on merits, the appeal Court's decree cannot be *res judicata*, the result would be that even though the decision of the trial Court given on the merits is confirmed by the dismissal of the appeal on a preliminary ground there can never be *res judicata*. We cannot therefore accept the contention that even though the trial Court may have decided the matter on the merits there can be no *res judicata* if the appeal Court dismisses the appeal on a preliminary ground without going into the merits, even though the result of the dismissal of the appeal by the appeal Court is confirmation of the decision of the trial Court given on the merits. Acceptance of such a proposition will mean that all that the losing party has to do to destroy the effect

of a decision given by the trial Court on the merits is to file an appeal and let that appeal be dismissed on some preliminary ground with the result that the decision given on the merits also becomes useless as between the parties. We are therefore of opinion that where a decision is given on the merits by the trial Court and the matter is taken in appeal and the appeal is dismissed on some preliminary ground, like limitation or default in printing it must be held that such dismissal when it confirms the decision of the trial Court on the merits itself amounts to the appeal being heard and finally decided on the merits whatever may be the ground for dismissal of the appeal.

It now remains to refer to certain decisions which were cited at the Bar in this connection. The first decision on which reliance is placed on behalf of the appellant is *Sheasagar Singh v Sitaram*¹. In that case there was a suit for a declaration that the defendant was not the son of a particular person. It appeared that in a former suit between the same parties the issue so raised had been decided against the plaintiffs by the trial Court. In appeal the only thing finally decided was that in a suit constituted as the former suit was no decision ought to have been pronounced on the merits. In those circumstances the Privy Council held that the issue had not been heard and finally decided in the former suit. These facts would show that that case has no application to the present case. In that case the finality of the judgment of the trial Court in the former suit had been destroyed by the appeal taken therefrom and the appeal Court decided that no decision ought to have been pronounced on the merits in the former suit constituted as it was. It was in those circumstances that the Privy Council held that the issue had not been heard and finally decided in the former suit. The facts in that case therefore were very different from the facts in the present case for the very decision of the appeal Court showed that nothing had been decided in that case and the decree of the trial Court on the merits was not confirmed. In the case before us though the decision of the High Court was on a preliminary point the decision on the merits of the trial Court was confirmed and that makes the decision of the High Court *res judicata*.

The next case to which reference has been made is *Ashgar Ali Khan v Ganesh Das*². In that case the appellant in pursuance of a deed of dissolution of partnership executed a bond for the payment of some money to the respondent. He sued to set aside the bond on the ground of fraudulent misrepresentation as to the amount due. The trial Court and on appeal the District Judge held that the alleged fraud was not established and dismissed the suit. Upon a further appeal to the Judicial Commissioner it was held without entering into the merits that the appellant could not avoid the bond as he did not claim to avoid the deed. The final Court of appeal thus refused to determine the issue of fraud and dismissed the suit on another ground. In a subsequent suit by the respondent upon the bond the appellant raised as a defence the same case of fraud. It was held that the issue raised by the defence was not *res judicata* since the matter had not been finally decided by the final Court of appeal. That case also has no application to the facts of the present case for in that case the final Court of appeal did not decide the question of fraud and dismissed the suit on another ground. In such a case it is well settled that there can be no *res judicata* where the final appeal Court confirms the decision of the Courts below on a different ground or on one out of several grounds and does not decide the other ground. The reason for this is that it is the decision of the final Court which is *res judicata* and if the final Court does not decide an issue it cannot be said that that issue has been heard and finally decided. In the present case however the result of the decision of the High Court in dismissing the appeals arising from Suits Nos 77 and 91 is to confirm the judgment of the trial Court on all the issues which were common and thus it must be held that the High Court's decision does amount to the appeals being heard and finally decided.

Then strong reliance has been placed on behalf of the appellant on *Shankar Sahai v Bhagat Sahai*³. In that case it was held that where two suits between

¹ (1896) LR 24 IA 50

² 34 MLJ 12 LR (1917) 44 IA 213

³ AIR 1946 Oudh 33

the same parties involving common issues were disposed of by one judgment but two decrees, and an appeal was preferred against the decree in one but it was either not preferred in the other or was rejected as incompetent, the matter decided by the latter decree did not become *res judicata* and it could be reopened in appeal against the former. This case certainly supports the view urged on behalf of the appellant. This case also overruled an earlier view of the Oudh Chief Court in *Bhagauti Din v. Bhagwat*¹. The reason given for the main proposition in this decision is that the Court must look at the substance of the matter and not be guided by technical considerations. In view of what we have said above, we cannot agree with the view taken in that case, and must hold that it was wrongly decided in so far as it holds that even where the appeal from one decree is dismissed, there will be no *res judicata*.

The next case to which reference may be made is *Obedur Rahman v. Darbari Lal*². In that case there were five appeals before the High Court three of which had abated. There was a common issue in all the five appeals namely, whether a certain lease had expired or not and it was urged that in view of the abatement of the three other appeals, the decision of that issue had become *res judicata*. The contention was overruled by the observation that "where there has been an appeal, the matter is no longer *res judicata* but *res sub judice* and where an appeal is not finally heard and decided any matters therein cannot possibly be said to be *res judicata*". This view in our opinion is incorrect. We may in this connection refer to *Syed Ahmad Ali Khan Alavi v. Hinga Lal*³, where it was held that where the appeal was struck off as having abated, the decision would operate as *res judicata*. If the view taken by the Lahore High Court is correct, the result would be that there may be inconsistent decisions on the same issue with respect to the point involved in that case, namely, whether a certain lease had expired or not and the very object of *res judicata* is to avoid inconsistent decisions. Where therefore the result of the dismissal or abatement of an appeal is to confirm the decision of the trial Court on the merits such dismissal must amount to the appeal being heard and finally decided and would operate as *res judicata*.

The next case to which reference has been made is *Ghansham Singh v. Bhola Singh*⁴. In that case there was a suit for sale on a mortgage and the trial Court gave a decree in favour of the plaintiff but awarded no costs. The plaintiff appealed against the decree in so far as it disallowed costs. The defendant also appealed as to the amount of interest allowed to the plaintiff. Both the appeals were heard together and decided by one judgment, and both the appeals were allowed. The plaintiff appealed to the High Court against the decree in the defendant's appeal below but did not appeal against the decree which was in his favour with respect to costs. It was held that the fact that the plaintiff had not appealed against the decision in his appeal was no bar to the hearing of the appeal against the decree passed in the defendant's appeal below. We do not see how this case can help the appellant. The matters in the two appeals were different one relating to costs and the other relating to interest; the rest of the judgment of the trial Court was not disputed and had become final. In such a case there was no question of the plaintiff appealing from a decision in his own favour as to costs and there could be no question of the decision as to costs being *res judicata* in the matter of interest. The facts of that case were therefore entirely different and do not help the appellant. It may also be added that that was a case of one suit from which two appeals had arisen and not of two suits.

The next case to which reference has been made is *Manohar Vinayak v. Laxman Anand Rao*⁵. In that case two suits were consolidated by consent of the parties and there were certain common issues. Appeal was taken from the decision in one suit and not from the decision in the other, and it was urged in the High Court that the decision in the other suit had become final. The High Court applied the principle

1. A.I.R. 1933 Oudh 531.

2. A.I.R. 1927 Lah. 1.

3. I.L.R. (1946) 21 Luck. 586.

4. I.I.R. (1923) 45 All. 509.

5. A.I.R. (1947) Nag. 248.

that *res judicata* could not apply in the same proceeding in which the decision was given and added that by a parity of reasoning it could not apply to suits which were consolidated. We may indicate that a contrary view has been taken in *Mrs Gertrude Oates v Mrs Millicent D Silva*¹ and *Zaharia v Debia*². We need not consider the correctness of these rival views as they raise the question as to whether one decision or the other can be said to be former where the two suits were decided by the same judgment on the same date. This question does not fall to be decided before us and we do not propose to express any opinion thereon. But the Nagpur decision is of no help to the appellant for in the present case *res judicata* arises because of earlier decision of the High Court in appeals arising from Suits Nos 77 and 91 *Panchanada Velan v Vathunatha Sasirial*³ and *Mst Lachmi v Balthi*⁴ are similar to the Nagpur case and we need express no opinion as to their correctness. The next case to which reference has been made is *Khetramohan Baral v Rasananda Misra*⁵. In that case six suits were heard together mainly because an important common issue was involved even though the parties were not the same and the properties in dispute were also different. The decision in one of the suits was not challenged in appeal while appeals were taken from other suits. The High Court held that in such circumstances the decision in one suit from which no appeal was taken would not be *res judicata* in other suits from which appeals were taken. In these cases the parties and properties were different and we do not think it necessary to express any opinion about the correctness of this decision. The facts in the present case are clearly different for the parties are the same and the title to the properties in dispute also depended upon one common question relating to jointness or separation.

A consideration of the cases cited on behalf of the appellant therefore shows that most of them are not exactly in point so far as the facts of the present case are concerned. Our conclusion on the question of *res judicata* raised in the present appeals is this. Where the trial Court has decided two suits having common issues on the merits and there are two appeals therefrom and one of them is dismissed on some preliminary ground like limitation or default in printing, with the result that the trial Court's decision stands confirmed, the decision of the appeal Court will be *res judicata* and the appeal Court must be deemed to have heard and finally decided the matter. In such a case the result of the decision of the appeal Court is to confirm the decision of the trial Court given on merits and if that is so, the decision of the appeal Court will be *res judicata* whatever may be the reason for the dismissal. It would be a different matter, however, where the decision of the appeal Court does not result in the confirmation of the decision of the trial Court given on the merits, as for example, where the appeal Court holds that the trial Court had no jurisdiction and dismisses the appeal, even though the trial Court might have dismissed the suit on the merits. In this view of the matter, the appeals must fail, for the trial Court had in the present case decided all the four suits on the merits including the decision on the common issues as to title. The result of the dismissal on a preliminary ground of the two appeals arising out of Suits No 77 and 91 was that the decision of the trial Court was confirmed with respect to the common issues as to title by the High Court. In consequence the decision on those issues became *res judicata* so far as Appeals Nos 365 and 366 are concerned and section 11 of the Code of Civil Procedure would bar the hearing of those common issues over again. It is not in dispute that if the decision on the common issues in Suits Nos 77 and 91 has become *res judicata*, Appeals Nos 365 and 366 must fail.

We therefore dismiss the appeals with costs, one set of hearing fee

V K

Appeals dismissed.

1 A I R (1933) Pat 78
2 I L R (1911) 33 All 51
3 I L R (1906) 29 Mad 333 16 M L J 63

4 I L R (1927) Lah 384
5 A I R (1962) Or ss 141

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—P. B. GAJENDRAGADKAR, *Chief Justice*, K. N. WANCHOO, M. HIDAYATULLAH, V. RAMASWAMI AND P. SATYANARAYANA RAJU, JJ.

The State of Punjab

.. Appellant*

v.

Amar Singh Harika

.. Respondent.

Patiala and East Punjab States Union General Provisions (Administration) Ordinance (XVI of 2005 BK), sections 13 and 14 (2)—Order of dismissal—When becomes effective—Person in the employment of Patiala and East Punjab States Union—Dismissal in contravention of section 14 (2)—Suit against State challenging the dismissal—Maintainability.

It is plain that the mere passing of an order of dismissal would not be effective unless it is published and communicated to the officer concerned. An order of dismissal passed against an officer by an appropriate authority and kept on its file without communicating it to the officer concerned or otherwise publishing it will not take effect from the date on which the order was actually written out. Such an order can only be effective after it is communicated to the officer or is otherwise published.

It is true that the Farman-i-Shahi which was the law in Patiala had provided that no suit shall be instituted by any individual against the State or any State Officer in respect of his dismissal from State service. After Patiala merged with and became part of the Patiala and East Punjab States Union, all laws, rules and regulations in the erstwhile State of Patiala were made applicable to the newly formed Union. As such, the Farman-i-Shahi also continued to be in operation. However, having regard to the specific provisions of sections 13 and 14 (2) of the Patiala and East Punjab States Union General Provisions (Administration) Ordinance (XVI of 2005-BK), the bar created by the Farman-i-Shahi against the competence of all suits must be deemed to have been removed in regard to cases of public servants who seek to challenge the legality or the validity of the orders of dismissal passed against them on the ground that they contravene the mandatory provisions of section 14 (2) of the Ordinance.

Appeal by Special Leave from the Judgment and Order dated the 28th September, 1961 of the Punjab High Court in Civil Regular First Appeal No. 36-P of 1956.

Bishan Narain, Senior Advocate (*R. N. Sachthey*, Advocate, with him), for Appellant.

Sukhdev Singh Sodhi and *Naunil Lal*, Advocates, for Respondent.

The Judgment of the Court was delivered by

Gajendragadkar, C.J.—The respondent, Amar Singh Harika, who was an Assistant Director, Civil Supplies, in the Patiala and East Punjab States Union, was dismissed from service by an order purported to have been passed on the 3rd June, 1949; this order was, however, communicated to him by the Chief Secretary, Pepsu Government, on the 2nd/3rd January, 1953. The respondent filed a suit against the appellant, the State of Punjab and alleged that the impugned order whereby he was dismissed from service, was invalid, inoperative and illegal. This suit was instituted by the respondent in the Court of Sub-Judge, II Class, Patiala. The respondent pleaded that the impugned order had been passed without holding any enquiry, and that the procedure adopted by the appellant in respect of the said enquiry was wholly illegal and invalid. That is why he claimed a declaration that despite the said order of dismissal, he continued to be an employee of the appellant and to hold his position as Assistant Director, Civil Supplies. As a consequential relief, the respondent also asked for an order calling upon the appellant to post him as Assistant Director, Civil Supplies, or to some other post of the same status.

This claim was resisted by the appellant on several grounds. The appellant urged that the suit filed by the respondent was incompetent in law. It also alleged

that the impugned order was valid, legal and binding on the respondent ; and it raised the plea of limitation.

On these pleadings, the learned trial Judge framed three issues ; they were - (1) Is the dismissal of the plaintiff from service of the defendant illegal, void and *ultra vires* ? (2) Is the suit within time ? and (3) Is the suit maintainable ? The first two issues were answered by the trial Judge in favour of the respondent. He, however, held that the suit filed by the respondent was not maintainable in law with the result that the respondent's claim was dismissed with costs.

Against the decree passed by the learned trial Judge, the respondent preferred an appeal in the Punjab High Court. The High Court has upheld the finding of the learned trial Judge in favour of the respondent on the first two issues, and has held that the dismissal of the respondent was *ultra vires*, void and illegal and that the respondent's suit was within time. In regard to the finding of the learned trial Judge that the respondent's suit was not maintainable, the High Court has taken a contrary view, it has held that the suit was maintainable. In the result, the respondent's claim has been decreed with costs throughout. It is this appellate decree which is challenged before us by Mr. Bishan Narain on behalf of the appellant in the present appeal which has been brought to this Court by Special Leave.

Before dealing with the points raised by Mr. Bishan Narain for our decision in the present appeal, it is necessary to state the material facts leading to the present litigation. The respondent was appointed as a permanent Assistant Director, Civil Supplies, Patiala, on the 15th June, 1948. Soon thereafter, he was suspended on the 5th July, 1948. The order passed by the Prime Minister, Patiala, which suspended him, directed that an Enquiry Committee consisting of Raja Shiv Dayal Singh, Sardar Rajwant Singh and Babu Banwari Lal should enquire into the charges framed against him. The substance of the charges thus framed against him was that he had abused his powers by issuing certain permits for the procurement of a thousand maunds of Bajra. On the 12th July, 1948, the respondent made a representation that Raja Shiv Dayal Singh who had been appointed the Chairman of the said Enquiry Committee, was disqualified to sit on the Enquiry Committee, because the transaction which had given rise to the charge against the respondent, had been entered into under his directions. Thereupon, Raja Shiv Dayal Singh was removed from the Chairmanship and Sodhi Sukhdev Singh, Legal Remembrancer, was appointed in his place. Later, Sodhi Sukhdev Singh became a member of the Enquiry Committee and Sardar Kartar Singh took the place of the Chairman. The Committee served a questionnaire on the respondent, and this questionnaire purported to contain several charges against him. This questionnaire was served on the respondent on the 8th September, 1948, and the respondent submitted his reply thereto on the 22nd September, 1948. On the 2nd October, 1948, the Committee submitted its report. It found that the respondent was guilty of the charges framed against him. In regard to the question of punishment, it left the matter to be decided by the Government.

It appears that the respondent had no knowledge of the fact that the Committee had submitted its report ; and so, he went on making representations to the Government in regard to the said charges. On the 16th December, 1948, he wrote to the Chief Secretary, Pepsu Government, Patiala, and complained that he had learnt from the Legal Remembrancer that the Committee had submitted a report, and yet he had not received a copy of the said report. By this time, Patiala State had merged in the Patiala and East Punjab States Union.

It seems that the Chief Secretary was not at all satisfied with the report made by the Committee against the respondent, and he recommended that the said report should be handed over to a Judge of the High Court or a Member of the Judicial Committee for his opinion after taking such further evidence as he may consider

necessary in the interests of justice. The Prime Minister, however, did not agree with this recommendation. On the 13th February, 1949, the Chief Secretary again urged the Prime Minister to consider the matter carefully and he expressed his belief that for the charges held proved against the respondent, the really guilty persons were Raja Shiv Dayal Singh and the ex-Prime Minister of Patiala himself. According to the Chief Secretary, the respondent had merely been made a scapegoat. On receiving this strongly worded letter from the Chief Secretary, the Prime Minister decided to refer the matter to the Public Service Commission. The Commission agreed with the report and recommended that exemplary punishment should be meted out to the respondent and that he should be dismissed from Government service from the date of his suspension.

Thereafter, on the 2nd/3rd May, 1949, the respondent received a communication from the Government of Pepsu, Home Department, in which it was suggested to him that in view of the definite finding of the Enquiry Committee holding him guilty of the charges levelled against him, he may exercise his option to resign. It was, however, added that even if he resigned, it should not be taken to imply any commitment on the part of the Government to accept the same. Pursuant to this letter, the respondent tendered his resignation on the 6th May, 1949. Notwithstanding his resignation, the appellant proceeded to pass an order of dismissal against him on the 3rd of June, 1949. This order purported to take effect from the date of the respondent's suspension which was the 5th of July, 1948. It is significant that though a copy of this order was forwarded to six persons noted thereunder, no copy of the same was sent to the respondent himself.

On the 29th January, 1951, the respondent made a representation to the Government of Pepsu in which he asked for a copy of the report of the Committee, a copy of the allegations on which the said report was based and a copy of the charge-sheet to show cause why the respondent should not suffer the punishment as proposed by the Government, before taking final action in the matter. He also prayed for a reasonable opportunity to show cause against the said punishment. In reply, the respondent was informed on the 16th April, 1951, by the Pepsu Government that his representation could not be considered in view of the fact that he had tendered resignation. However, it was on the 28th May, 1951, that the respondent was informed by Bishan Chand, Assistant Comptroller, Pepsu, that the record of the office showed that he had been dismissed from Government service with effect from the date of his suspension. It is on this date that the respondent came to know about his dismissal for the first time.

Then followed further correspondence between the respondent and the appellant. When, however, the respondent found that all his pleas failed, he withdrew his resignation on the 22nd August, 1952. Last came the order passed on the 2nd/3rd January, 1953 by the Chief Secretary to Government, Pepsu. This order informed the respondent that his last application dated the 20th August, 1952, requesting for reinstatement on the ground that his dismissal was unlawful and unjust, was rejected and that Government found it impossible to reopen his case. On receiving this order, the respondent filed the present suit on the 20th April, 1954.

The first question which has been raised before us by Mr. Bishan Narain is that though the respondent came to know about the order of his dismissal for the first time on the 28th May, 1951, the said order must be deemed to have taken effect as from the 3rd June, 1949 when it was actually passed. The High Court has rejected this contention; but Mr. Bishan Narain contends that the view taken by the High Court is erroneous in law. We are not impressed by Mr. Bishan Narain's argument. It is plain that the mere passing of an order of dismissal would not be effective unless it is published and communicated to the officer concerned. If the appointing authority passed an order of dismissal, but does not communicate it to the officer concerned, theoretically it is possible that unlike in the case of a

judicial order pronounced in Court, the authority may change its mind and decide to modify its order. It may be that in some cases, the authority may feel that the ends of justice would be met by demoting the officer concerned rather than dismissing him. An order of dismissal passed by the appropriate authority and kept with itself, cannot be said to take effect unless the officer concerned knows about the said order and it is otherwise communicated to all the parties concerned. If it is held that the mere passing of the order of dismissal has the effect of terminating the services of the officer concerned, various complications may arise. If before receiving the order of dismissal, the officer has exercised his power and jurisdiction to take decisions or do acts within his authority and power would those acts and decisions be rendered invalid after it is known that an order of dismissal had already been passed against him? Would the officer concerned be entitled to his salary for the period between the date when the order was passed and the date when it was communicated to him? These and other complications would inevitably arise if it is held that the order of dismissal takes effect as soon as it is passed, though it may be communicated to the officer concerned several days thereafter. It is true that in the present case, the respondent had been suspended during the material period, but that does not change the position that if the officer concerned is not suspended during the period of enquiry, complications of the kind already indicated would definitely arise. We are, therefore, reluctant to hold that an order of dismissal passed by an appropriate authority and kept on its file without communicating it to the officer concerned or otherwise publishing it will take effect as from the date on which the order is actually written out by the said authority, such an order can only be effective after it is communicated to the officer concerned or is otherwise published. When a public officer is removed from service, his successor would have to take charge of the said office, and except in cases where the officer concerned has already been suspended, difficulties would arise if it is held that an officer who is actually working and holding charge of his office, can be said to be effectively removed from his office by the mere passing of an order by the appropriate authority. In our opinion, therefore, the High Court was plainly right in holding that the order of dismissal passed against the respondent on the 3rd June, 1949 could not be said to have taken effect until the respondent came to know about it on the 28th May, 1951.

The next question is whether the High Court was right in holding that the respondent's suit is competent. It is true that the Farman-i-Shahi which was the law in Patiala at the relevant time had provided that no suit shall be instituted by any private individual against the State or any State Officer in respect of his dismissal from State service. After Patiala merged with and became a part of the Patiala and East Punjab States Union, all laws, rules and regulations in the erstwhile State of Patiala were made applicable to the newly formed Union. As such, the Farman-i-Shahi also continued to be in operation; but, as has been pointed out by the High Court, section 13 of the Patiala and East Punjab States Union General Provisions (Administration) Ordinance, 2005-BK (XVI of 2005-BK) (hereinafter referred to as "the Ordinance") expressly provided that Government may sue or be sued by the name of the Government of the State or in such other manner as may, by notification, be directed by the Government, though section 12 retained the bar of certain suits against the State as therein provided. The question is whether in view of section 13 of the Ordinance, the present suit is competent or not, and in deciding this question, it is necessary to refer to section 14 of the Ordinance. Section 14 reads thus—

"(1) Subject to the provisions of sub-section (2), the Rajpramukh, or any authority authorised in this behalf by the Rajpramukh, may—

(a) regulate the recruitment and conditions of service of persons appointed to public services, and to posts in connection with the affairs of the Government, or

(b) make rules or regulations for the conduct of Government servants who are members of the public services or are holding posts in connection with the affairs of the Government, or for any other matter relating to them.

(2) No person who is a member of a civil service of the State or holds any Civil Post in the State shall be dismissed from service or reduced in rank until he has been given a reasonable opportunity of showing cause against the action proposed to be taken against him."

There is a proviso to this section which is not relevant for our purpose. The High Court has taken the view that having regard to the specific provisions of section 14 (2) of the Ordinance, the bar created by the Farman-i-Shahi against the competence of all suits must be deemed to have been removed in regard to cases of public servants who seek to challenge the legality or the validity of the orders of dismissal passed against them on the ground that they contravene the mandatory provisions of section 14 (2) of the Ordinance. Section 14, in substance, corresponds to Article 311 of the Constitution; and in our opinion, the High Court is right in holding that having regard to the significance and importance of the guarantee contained in section 14 (2) of the Ordinance, it would be reasonable to hold that suits filed by public servants for the purpose of challenging the validity of orders of dismissal passed against them in contravention of section 14 (2) are competent. Besides, section 13 of the Ordinance itself seems to authorise the institution of such a suit and the High Court has observed that "the protection afforded by the said section would be not only meaningless but wholly elusive if a suit like the present is held to be incompetent." Therefore, we are not satisfied that Mr. Bishan Narain can successfully challenge the correctness of the decision of the High Court that the suit filed by the respondent is competent. It will be noticed that this conclusion is based on section 14 of the Ordinance quite apart from the provisions of Article 311 of the Constitution.

That leaves only one question to be considered; did the respondent get the benefit of section 14 (2) of the Ordinance? The answer to this question must clearly be in favour of the respondent. The enquiry held against the respondent seems to us to be illegal and invalid from beginning to end. What purports to be the charge-sheet framed against the respondent is no more than a questionnaire, and some of these questions clearly show that the approach adopted by the authorities that drafted the said questions, was completely unreasonable, if not perverse. One of the questions which was put in this questionnaire was, on whose authority the respondent cancelled the permits issued by him to the bogus representative? It is surprising that the substance of the charge being that permits for the procurement of 1,000 mds. of Bajra were issued to a bogus representative, it should have been suggested that in cancelling the said permits, the respondent had done something which was wrong. Another question seems to suggest that when the respondent in self-defence pleaded that he had acted under the orders of the higher authorities, that itself, it was thought, constituted misconduct. Therefore, what purports to be the charge-sheet itself discloses a serious infirmity in the approach adopted in initiating the proceedings against the respondent.

Then as to the reasonable opportunity guaranteed by section 14 (2) of the Ordinance, it is clear that a copy of the report made against him has not been supplied to the respondent; and even when he was heard before the order of dismissal was passed against him, he had no means of knowing what grounds had weighed with the Enquiry Committee when it made a report against him. Having regard to the procedure adopted by the State authorities in appointing the Enquiry Committee, in formulating the questionnaire containing the charges against the respondent, in making the report, and in dealing with the recommendations made by the Chief Secretary from time to time, we are satisfied that the High Court was right in coming to the conclusion that the respondent had not received a reasonable opportunity to make his defence, and that the proceedings of the enquiry and the report made by the Committee, as well as the final order of dismissal passed against the respondent have contravened the safeguards guaranteed by section 14 (2) of the Ordinance.

The result is, the appeal fails and is dismissed with costs.

V.K.

Appeal dismissed.

THE SUPREME COURT OF INDIA

(Civil Appellate Jurisdiction)

PRESENT —P B GAJENDRAGADKAR, *Chief Justice*, K N WANCHOO,
M HIDAYATULLAH, V RAMASWAMI AND P SATYANARAYANA RAJU, JJ

Ram Gopal Reddy

Appellant*

v

The Additional Custodian, Evacuee Property, Hyderabad

Respondent

*Administration of Evacuee Property Act (XXXI of 1950) section 46—Scope—Property which belonged to an evacuee declared as evacuee property—Person claiming the same as belonging to him not availing of the remedies under the Act—Suit by him for declaration of his title—If barred by section 46**Transfer of Property Act (IV of 1882) section 53 A—Applicability*

The scheme of the Administration of Evacuee Property Act clearly is that where a certain property admittedly belonged to an evacuee any person claiming the property or any interest or right therein has on receipt of notice under section 7 (1) requiring him to show cause why the property should not be declared as evacuee property to appear before the authorities entitled to deal with the matter. Any person aggrieved by an order of such an authority has the right to appeal under section 24 and if necessary to go on revision under section 27. Having provided this complete machinery for adjudication of all claims with respect to evacuee property the Act by section 46 bars the jurisdiction of civil or revenue Courts to entertain or adjudicate upon any question whether any property or any right to or interest in any property is or is not evacuee property. Where therefore the property or any right to or interest in any property undoubtedly belonged to the evacuee and any transferee from the evacuee claims the property or any right to or interest therein he has to avail of the remedies provided under the Act. If he fails to do so he cannot file a suit in the civil or revenue Court to have the question whether any property or any right to or any interest therein is or is not evacuee property decided in view of the clear provision of section 46 of the Act.

In a suit filed by the plaintiff for a declaration that he is the owner of certain property the plaintiff cannot take the benefit of section 53-A of the Transfer of Property Act.

Appeal from the Judgment and Decree dated the 8th April, 1960, of the Andhra Pradesh High Court in Appeal No. 21/1 of 1956 *

T V R Talachari, Advocate, for Appellant

N S Bindra, Senior Advocate (R N Sachthey, Advocate, with him) for Respondent

The Judgment of the Court was delivered by

Wanchoo, J.—The only question raised in this appeal on a certificate granted by the Andhra Pradesh High Court is whether the suit brought by the appellant is barred under section 46 of the Administration of Evacuee Property Act, XXXI of 1950, (hereinafter referred to as the Act). The facts are not in dispute and may be briefly narrated.

On 15th November, 1946, the appellant claimed to have purchased certain *patta* lands from one Abdul Aziz Khan and paid him Rs. 6127/8/- in Osmania Sica. The appellant got possession of the land and thereafter in June, 1949 Abdul Aziz Khan applied in the Tehsil office for the transfer of the *patta* in the name of the appellant. Before, however, any transfer was made, Abdul Aziz Khan seemed to have migrated to Pakistan. Consequently, the Deputy Custodian took steps to declare Abdul Aziz Khan an evacuee. In that connection the appellant received notice from the Deputy Custodian in December, 1950 under section 7 of the Act asking him to show cause why the land should not be declared evacuee property. Though the appellant's case was that he engaged a Counsel to appear on his behalf before the Deputy Custodian, no one seems to have appeared on his behalf, and in consequence, the Deputy Custodian declared the property to be evacuee property. Thereafter the appellant was given a notice requiring him to surrender possession of the land to the Tahsildar. The appellant then made

representation before the Deputy Custodian that he had purchased the property from Abdul Aziz Khan in 1946 and was the owner thereof from before the Evacuee Property Law came into force. The Deputy Custodian called upon him to produce evidence and thereafter recommended to the Custodian that the property might be declared not to be evacuee property. The Custodian did not accept this recommendation on the ground that there was no registered sale deed duly executed by Abdul Aziz Khan in favour of the appellant and no transfer of property could therefore be said to have taken place in 1946, and ordered that the declaration of the property as evacuee property should stand and further said that if the appellant was aggrieved by this decision he could obtain a declaration of his rights from a competent Court. In consequence, the appellant filed the suit out of which the present appeal has arisen in the Court of the Subordinate Judge, Nizamabad and prayed that a declaration be made that he was the owner of the property and in possession thereof and that the Custodian be ordered to execute and register a sale deed thereof in his favour. The suit was resisted by the Custodian and the main contention raised on his behalf was that the suit was barred under section 46 of the Act. The Subordinate Judge however held that the appellant was entitled to the benefit of section 53-A of the Transfer of Property Act (IV of 1882) and that the civil Court had jurisdiction inasmuch as the sale had taken place before 1947.

The Custodian then went in appeal to the High Court, and the only question raised there was that the suit was barred under section 46 of the Act. The High Court reversed the decision of the Subordinate Judge and held that the appellant had been given notice under section 7 of the Act in December, 1950 and did not appear before the Deputy Custodian with the result that the property was declared as evacuee property. The High Court further held that after this declaration the appellant's remedy was to proceed by way of appeal or revision under the Act and that a suit was barred in view of section 46 thereof. The appellant's contention that as he was a third party he was entitled to maintain the suit was negatived by the High Court. In consequence the High Court dismissed the suit but directed the parties to bear their own costs. The appellant then obtained a certificate from the High Court to appeal to this Court, and that is how the matter has come up before us.

We are of opinion that there is no force in this appeal. It is unnecessary to consider the cases cited at the Bar on behalf of the appellant for whatever may be the position of law where the title of the evacuee himself is in dispute, as to which we express no opinion, there can be no doubt that where the property admittedly belonged to the evacuee and the person filing the suit claims to be a transferee from the evacuee, the suit would certainly be barred in view of section 46 of the Act. Section 46 *inter alia* lays down that "save as otherwise expressly provided in this Act, no civil or revenue Court shall have jurisdiction to entertain or adjudicate upon any question whether any property or any right to or interest in any property is or is not evacuee property." It is admitted that the appellant had received notice from the Deputy Custodian under section 7 (1) of the Act but had neglected to appear before him and it was in those circumstances that the Deputy Custodian declared the property to be evacuee property. That order of the Deputy Custodian could be taken in appeal under section 24 by the appellant to the authorities provided under the Act, and if necessary the appellant could also go in revision to the Custodian-General under section 27. The scheme of the Act clearly is that where the property admittedly belongs to the evacuee any person claiming the property or any interest or right therein has on receipt of a notice under section 7 (1) to appear before the authorities entitled to deal with the matter under the Act. Any person aggrieved by an order of such an authority made under section 7 has the right to appeal under section 24 and if necessary to go in revision under section 27. The Act thus provides a complete machinery for a person interested in any property to put forward his claims before the authorities competent to deal with the question and to go in appeal and in revision if the person interested feels aggrieved. Having provided this complete machinery for adjudication of all claims with respect to evacuee

property, the Act by section 46 bars the jurisdiction of civil or revenue Courts to entertain or adjudicate upon any question whether any property or any right to or interest in any property is or is not evacuee property. Where therefore the property or any right to or interest in any property undoubtedly belonged to the evacuee and any transferee from the evacuee claims the property or any right to or interest therein he has to avail of the remedies provided under the Act. If he fails to do so he cannot file a suit in the civil or revenue Court to have the question whether any property or any right to or any interest therein is or is not evacuee property decided in view of the clear provisions of section 46 (a) of the Act. The fact that the Custodian in his order said that the appellant could go and establish his right in a competent Court is of no assistance to the appellant, for if the law bars the jurisdiction of civil and revenue Courts the Custodian's observation that the party before him could go to a competent Court to establish his right will not confer jurisdiction on a civil or revenue Court. Nor can it be said on the facts found in the present case that the appellant had become the owner of the property before 1947 for admittedly the property was worth more than Rs 100 and it is not disputed that a registered sale deed was necessary to pass title from Abdul Aziz Khan to the appellant. No registered sale deed was executed in this case and therefore the property did not pass from Abdul Aziz Khan to the appellant even upto the time when Abdul Aziz Khan became an evacuee. It may be that if Abdul Aziz Khan had tried to get back the property, section 53 A of the Transfer of Property Act would come to the aid of the appellant in defence. But the present suit has been filed to establish the right of the appellant as owner of the property and in such a suit the appellant cannot take the benefit of section 53 A of the Transfer of Property Act. We therefore hold in agreement with the High Court that the suit is clearly barred under section 46 (a) of the Act.

The appeal therefore fails and is hereby dismissed. In the circumstances we pass no order as to costs.

V K

Appeal dismissed

THE SUPREME COURT OF INDIA¹

(Civil Appellate Jurisdiction)

PRESENT —K SUBBA RAO M Hidayatullah and R S BACHAWAT, JJ

Dayawati and another

Appellants*

v

Inderjit and others

Respondents

Interpretation of Statute —Rule, as to invocation of title of title right —Not absolute

Punjab Relief of Indebtedness Act (VII of 1934) sections 5 and 6—Retrospectivity sanctioned by section 6—Scope and extent of—Applicability of section 5 to pending suits—Pending suits mean of—If includes pending appeal from the suit—Suit not to be dismissed to enforce a mortgage—Punjab law of 1934 passed—Punjab Relief of Indebtedness Act extended to Delhi—Due regard to pending appeals from such preliminary decrees—Application before Appellate Court for reversal—Section 5—Mandatory

Ordinarily a Court of appeal cannot take into account a new law brought into existence after the judgment appealed from has been rendered because the rights of the litigants in appeal are determined under the law in force at the date of the suit. Matters of procedure are however different and the law affecting procedure is always retrospective. But it does not mean that there is an absolute rule of invocation of substantive rights. If the new law speaks in language which expressly or by clear intendment takes account of pending matters the Court of trial as well as the Court of appeal must have regard to the intent so expressed and the Court of appeal may give effect to such a law even after the judgment of the Court of first instance. The distinction between laws affecting procedure and those affecting vested rights does not matter when the Court is invited by law to take away from a successful plaintiff what he has obtained under a judgment.

Section 6 of the Punjab Relief of Indebtedness Act is clearly retrospective by virtue of which section 5 of that Act which amends section 3 of the Usurious Loans Act (X of 1918) will apply to a

suit pending on or instituted after the commencement of the Punjab Relief of Indebtedness Act. In speaking of a 'pending suit' in section 6, the Legislature was thinking not only in terms of the suit proper but also of those stages in the life of the suit which ordinarily take place before a final executable document comes into existence. The words 'pending suit' mean a live suit whether in the Court of first instance or in an appeal Court where the judgment of the Court of first instance is being considered. The section thus excludes only those suits in which nothing further needs to be done in relation to the rights or claims litigated because an executable decree which may not be reopened is already in existence.

Thus, where during the pendency of an appeal from a preliminary decree passed in a suit instituted in Delhi for enforcement of a mortgage, the Punjab Relief of Indebtedness Act was extended to Delhi and thereupon the mortgagor presented an application to the appellate Court for relief under section 3 of the Usurious Loans Act as amended by section 5 of the Punjab Relief of Indebtedness Act ;

Held, the application was maintainable and the amount of interest in the mortgage could be reduced by applying the provisions of section 3 of the Usurious Loans Act as amended by section 5 of the Punjab Relief of Indebtedness Act.

In connection with some matters and some statutes it is said that an appeal is a continuation of a suit. In the Punjab Relief of Indebtedness Act the intention is to give relief in respect of excessive interest in a suit which is pending and a preliminary decree in a suit to enforce a mortgage does not terminate the suit.

Appeal by Special Leave from the Judgment and Decree dated the 15th October, 1959 of the Punjab High Court (Circuit Bench) at Delhi in R.F.A. No. 1-D of 1954.

S. T. Desai and *D. R. Prem*, Senior Advocates, (*Mohan Behari Lal*, Advocate, with them), for Appellants.

N. C. Chatterjee, Senior Advocate, (*H. P. Wanchoo*, Advocate, with him), for Respondents 1 to 5.

Tiryagi Narain, Advocate, for Respondent 6.

The Judgment of the Court was delivered by

Hidayatullah, J.—In this appeal by Special Leave against the judgment and decree of the Punjab High Court dated 15th October, 1959, the only question is whether, in the facts to be stated presently, the High Court was right in reducing interest in a preliminary mortgage decree dated 12th August, 1953, by applying sections 5 and 6 of the Punjab Relief of Indebtedness Act which were extended to Delhi on 8th June, 1956.

On 17th January, 1946 Hazarilal (predecessor of respondents 1 to 5) and one Jagat Narain (respondent 6) executed a simple mortgage deed for Rs. 50,000 with interest at 9 per cent. per annum or in default of payment of interest for 3 months at Re. 1 per cent. per month for the period of default. As the mortgagors made default in payment of interest and also did not pay anything out of the mortgage amount a suit was filed for enforcement of the mortgage by sale of properties. The claim was for Rs. 76,692-9-8, by calculating interest at 9 per cent. per annum for the first 3 months and at 12 per cent. per annum till institution of the suit and allowing credit for Rs. 14,000 as repayment. The defendants admitted the mortgage and the consideration but pleaded that the rate of interest was both penal and excessive. This plea was not accepted and a preliminary decree was passed for the full claim on 12th August, 1953. Hazarilal alone appealed on 5th January, 1954 (R.F.A. No. 1-D of 1954) and asked for reduction of interest by Rs. 7,900 and of the rate of future interest to 9 per cent. per annum. Court-fee was paid on Rs. 7,900. During the pendency of this appeal the decree was made final on 3rd April, 1954.

Before the appeal was disposed of Inderjit and Satya Narain, sons of Hazarilal, filed a suit for a declaration that the properties were ancestral and belonged to a joint family. They claimed that the properties could not be sold and asked for a temporary injunction which was first granted and later vacated. Against the order vacating the stay they filed an appeal (F.A.O. No. 68-D of 1957) and obtained

temporary stay from the High Court. The mortgagees also filed in that appeal a petition (C M No 1318-D of 1957) for vacation of the stay order. On 10th February, 1958 a conditional stay order was passed by a learned single Judge of the High Court but we need not trouble ourselves with it.

On 29th October, 1958, the legal representatives of Hazarilal (respondents 1 to 5) presented an application under section 3 of the Usurious Loans Act, as amended by section 5 of the Punjab Relief of Indebtedness Act, when the latter Act was extended to Delhi on 8th June, 1956 under section 2 of Part C States (Laws) Act, 1950 (XXX of 1950) and claimed that interest in excess of $7\frac{1}{2}$ per cent per annum could not be awarded in this suit. We may, at this stage, read the relevant sections. Section 3 of the Usurious Loans Act, in so far as it is material to our purpose, reads as follows:

" 3 *Re-opening of transactions*

(1) Notwithstanding anything in the Usury Laws Repeal Act, 1855, where, in any suit to which this Act applies whether heard *ex parte* or otherwise, the Court has reason to believe,—

(a) that the interest is excessive, and

(b)

the Court may exercise all or any of the following powers, namely, may,—

(i) re-open the transaction, take an account between the parties and relieve the debtor of all liability in respect of any excessive interest,

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.

(2) (a) In this section "excessive" means in excess of that which the Court deems to be reasonable having regard to the risk incurred as it appeared, or must be taken to have appeared, to the creditor at the date of the loan

(b)

(c)

(d)

(3) This section shall apply to any suit, whatever its form may be, if such suit is substantially one for the recovery of a loan or for the enforcement of any agreement or security in respect of a loan or for the redemption of any such security

.
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By section 5 of the Punjab Relief of Indebtedness Act, it was provided —

" 5. *Amendment of the Usurious Loans Act, 1918* —

In section 3 of the Usurious Loans Act, 1918 (X of 1918)—

(i) for the word "and" in clause (a) of sub-section (1) the word "or" shall be substituted

(ii) for the word "may" where it appears for the first time in sub-section (1) the word "shall" shall be substituted,

(iii) for the word "may" after the word "namely" in sub-section (1) the word "shall" shall be substituted,

(iv) to sub-section (2), the following clause shall be added, namely —

"e" The Court shall deem interest to be excessive if it exceeds seven and a half per centum per annum simple interest or is more than two per centum over the Bank rate whichever is higher at the time of taking the loan, in the case of secured loans or twelve and a half per centum per annum simple interest in the case of unsecured loans. Provided that the Court shall not deem interest in excess of the above rates to be excessive if the loan has been advanced by the State Bank of India or any bank included in the Second Schedule to the Reserve Bank of India Act, 1934, or any banking co-operative society registered under the Bombay Co-operative Societies Act, 1925, as extended to the State of Delhi."

Section 6 of the Act gave retrospective effect to the above provisions by enacting —

" 6 *Retrospective effect* —

The provisions of this part of the Act shall apply to all suits pending on or instituted after the commencement of this Act."

The decree-holders opposed the application on the grounds that section 5 of the Punjab Relief of Indebtedness Act merely amended its application and that no such plea was taken in the Court below. R.F.A. No. 1-D of 1954 came before a Divisional Bench and by the judgment under appeal the amount of interest in the mortgage was reduced by Rs. 15,021. The Divisional Bench followed an earlier decision of the same Court reported in *L. Ram Sukh Das v. Hafiz-ul-Rahman and others*¹. It was held in that case that the provisions of the Punjab Relief Indebtedness Act applied to a case in which a decree had already been passed and an appeal was pending at the time the amendment was brought into force. The Divisional Bench in this case held that on the date on which they decided the appeal the provisions of the Punjab Relief of Indebtedness Act had been extended to Delhi and they were required to apply those provisions and interest in excess of 7½ per cent. per annum could not be awarded.

The preliminary decree was modified by reducing interest up to the date of the suit to Rs. 11,665 by applying the rate of 7½ per cent. per annum simple and future interest was awarded also at the same rate. The judgment-debtors who had applied in the High Court were ordered to make good the Court-fee on Rs. 7,127. After sundry unsuccessful proceedings which included an application for review and another for a certificate, the decree-holders filed this appeal after obtaining Special Leave of this Court.

In this appeal it is contended on behalf of the decree-holders that section 5 of the Punjab Relief of Indebtedness Act can only apply to a suit instituted or pending after the section comes into force and not in an appeal after the suit has ended in a decree. It is further contended that this will be all the more so, because the section itself is made retrospective for suits pending on or instituted after the commencement of the Act and thus cannot affect the vested right which the judgment had given to the appellants. We have, therefore, to decide whether the provisions of sections 5 and 6 of the Punjab Relief of Indebtedness Act could be invoked by the Divisional Bench to reduce the interest as stated above.

The amended section 3 of the Usurious Loans Act is plainly mandatory because it makes it obligatory for a Court to re-open a transaction if there is reason to believe that the interest is excessive. Further, where the rate of interest exceeds seven and a half per centum per annum simple, the Court must hold that it is excessive. Therefore if the amended section 3 of the Usurious Loans Act applies to the case in hand, the High Court was right in acting as it did. To this Mr. S. T. Desai raises no exception. He contends, however, that section 6 of the Relief of Indebtedness Act in giving retrospection to section 5 by which the amendments were made, limits it to suits pending on or instituted after the commencement of the Relief of Indebtedness Act and submits that the suit here was neither pending on nor instituted after 8th June, 1956, when that Act commenced in the Union Territories of Delhi. The respondents in reply submit that the appeal Court must apply the provisions of the Relief of Indebtedness Act same as the Court of trial, because the word 'suit', where the section speaks of a pending suit, includes an appeal from the decision in the suit.

Now as a general proposition, it may be admitted that ordinarily a Court of appeal cannot take into account a new law, brought into existence after the judgment appealed from has been rendered, because the rights of the litigants in an appeal are determined under the law in force at the date of the suit. Even before the days of Coke, whose maxim—a new law ought to be prospective, not retrospective in its operation—is oft-quoted, Courts have looked with disfavour upon laws which take away vested rights or affect pending cases. Matters of procedure are, however, different and the law affecting procedure is always retrospective. But it does not

mean that the rule of inviolability of substantive rights. If the new law speaks in language from the High Court, expressly or by clear intendment, takes in even pending matters, the Court of appeal must have regard to an intention so expressed, as well as the Court of appeal may give effect to such a law even after the judgment of the Court of first instance. The distinction between laws affecting procedure and those affecting vested rights does not matter when the Court is invited by law to take away from a successful plaintiff, what he had obtained under a judgment. See *Quilter v Maphahle*¹, and *Stovin v Fairbrass*², which are instances of new laws being applied. In the former the vested rights of the landlord to recover possession and in the latter the vested rights of the statutory tenant to remain in possession were taken away after judgment. See also Maxwell Interpretation of Statutes (11th Edition), pages 211 and 213, and *Mukerjee (K C) v Mst Ramratan*³, where no saving in respect of pending suits was implied when section 26 (N) and (O) of the Bihar Tenancy Act (as amended by Bihar Tenancy Amendment Act, 1934) were clearly applicable to all cases without exception.

Section 6 of the Relief of Indebtedness Act is clearly retrospective. Indeed, the heading of the section shows that it lays down the retrospective effect. Thus being so, the core of the problem really is whether the suit could be said to be pending on 8th June, 1936, when only an appeal from the judgment in the suit was pending. This requires the consideration whether the word 'suit' includes an appeal from the judgment in the suit. An appeal has been said to be "the right of entering a superior Court, and invoking its aid and interposition to redress the error of the Court below" [per Lord Westbury in *Attorney General v Sillem*⁴]. The only difference between a suit and an appeal is this that an appeal "only reviews and corrects the proceedings in a cause already constituted but does not create the cause." As it is intended to interfere in the cause by its means, it is a part of it, and in connection with some matters and some statutes it is said that an appeal is a continuation of a suit. In the present Act the intention is to give relief in respect of excessive interest in a suit which is pending and a preliminary decree in a suit of this kind does not terminate the suit. The appeal is a part of the cause because the preliminary decree which emerges from the appeal will be the decree, which can become a final decree. Such an appeal cannot have an independent existence. If this be not accepted for the purpose of the application of section 3 of the Usurious Loans Act (as amended) curious results will follow. The appeal Court in the appeal is not able to resort to the section but if the suit were remanded the trial Court would be compelled to apply it. For although, in the appeal proper, that judgment must be rendered which could be rendered by the Court of trial, but if the suit is to be reheard, then the judgment must be given on the existing state of the law and that must include section 5 by reason of section 6 of the Punjab Relief of Indebtedness Act. It is hardly to be suggested that this obvious anomaly was allowed to exist. It would, therefore, appear that in speaking of a pending suit, the Legislature was thinking not only in terms of the suit proper but also of those stages in the life of the suit which ordinarily take place before a final executable document comes into existence. The words of the section we are concerned with, speak of a suit pending on the commencement of the Act and it means a live suit whether in the Court of first instance or in an appeal Court where the judgment of the Court of first instance is being considered. It only excludes those suits in which nothing further needs to be done in relation to the rights or claims litigated because an executable decree which may not be reopened is already in existence. The decision of the High Court was right in applying section 3 of the Usurious Loans Act (as amended) to the case.

The appeal thus fails and it will be dismissed with costs

V.K.

Appeal dismissed

1 (1832) L.R. 9 Q.B.D. 672.

2 (1919) 88 L.J.K.B. 1004

3 (1935) L.R. 63 L.A. 47, 70 M.L.J. 105

AIR 1936 PG 49

4 11 ER 1200 at 1209

THE SUPREME COURT OF INDIA

(Civil Appellate Jurisdiction)

PRESENT :—P. B. GAJENDRAGADKAR, M. HIDAyatullah, J. and J.C. SHAH, JJ.

Garikapati Veerayya

v.

Nannapaneni Subbayya Chowdhary and others

.. Appellant*

.. Respondents.

Specific performance—Agreement to sell—Suit for specific performance—Plaintiff-purchaser's readiness and willingness to perform his part—Necessity—Mode of proof of such readiness and willingness.

Civil Procedure Code (V of 1908), section 96, Order 6, Rule 7—Departure from specific case set up in plaint—Permissibility—New plea of fact not set up in plaint—If can be raised for first time in appeal.

There is no doubt that in a suit for specific performance the plaintiff must show that he was ready and willing to perform his part of the contract from the time the contract was made till the date of decree. He must aver in his plaint that he was ready and willing to perform his part of the contract and if the averment is traversed he must prove the said averment. Law does not require that in order to prove his readiness and willingness, the plaintiff in a suit for specific performance of an agreement to sell must show that he had ready in his hands the requisite amount which had to be paid by him to his vendor. If he proves that he had in his hands such ready amount and was willing to pay it, that of course is a very clear case of the plaintiff's readiness and willingness. But the same fact can be proved if the plaintiff can show that at all material times he could have raised the said amount and was willing to do so and was prepared to perform his part of the contract. If he fails to allege and prove his readiness and willingness he has no right to claim specific performance.

But where the plaintiff filing a suit for specific performance of an agreement to sell does not specifically aver in the plaint, in general terms, his readiness and willingness to perform his part but only chooses to make a clear, categorical and specific plea that he was having the necessary funds ready with him at all material times and was ready and willing to pay the same to the defendant on his executing conveyance, it would not be open to him to give up that case and to contend in the alternative that even if he had not the cash ready with him as alleged he could have raised the same at all material times.

In such a case the new plea of fact that the plaintiff could have raised the amount cannot be raised for the first time in appeal, and the suit for specific performance decreed on the ground that the said plea had been established.

Appeal by Special Leave from the Judgment and decree dated 4th March, 1955 of the Andhra High Court in A.S. No. 301 of 1951†

M. S. K. Sastri, Nori Subramanya Sastri and M. S. Narasimhan, Advocates for Appellant.

Purshottam Trikamdas, Senior Advocate (Rasiklal, B. Shah and K. R. Chaudhuri Advocates with him), for Respondents Nos. 1 and 2.

The Judgment of the Court was delivered by

Gajendragadkar, J.—This appeal arises out of a suit filed by respondents 1 and 2 against the appellant claiming specific performance of an agreement to sell the land in suit which had been executed in favour of respondent No. 1 by the appellant on 4th December, 1947. The case set up by the said respondents in their plaint was that under the agreement in question, the appellant had undertaken to execute a sale-deed in respect of the property covered by it within a month after the date of the agreement for payment of Rs. 11,400. At the time of the agreement, Rs. 1,500 had been paid and Rs. 2,000 and Rs. 1,000 had been paid thereafter on 14th January, 1948 and 2nd February, 1948 respectively. Respondent No. 1 had kept the balance of the sale-price ready to be paid to the appellant, but the appellant postponed executing the sale-deed and so, the present suit had to be instituted claiming specific performance of the said agreement.

* C.A. No. 144 of 1961. † Reported in 1955 An.W.R. 502.

8th March, 1963.

That plant from the High Court that on 16th September, 1948, the second respondent had agreed to purchase property from the first respondent for Rs 13,200, and so, the second respondent had joined the first respondent in the present suit. The plant claimed that no deed should be executed by the appellant in favour of the second respondent. In this action, one Manthasa Venkatapathiraju was impleaded as defendant No. 1, the appellant having been impleaded as defendant No. 2. The plant alleged that defendant No. 2 claimed to be a prior mortgagee of the suit property and set up some conflicting claims in regard to the said property, and so, it became necessary to add him as a party defendant to the present action.

The claim thus made by the two respondents was challenged by the appellants. His case was that respondent No. 1 was not ready and willing to carry out his part of the contract and that after waiting for a sufficiently long period, the appellant had called upon respondent No. 1 to pay the balance within four days by a telegraphic notice sent on 1st October, 1948. Since respondent No. 1 did not comply with the said notice, the appellant informed him by a notice on 16th November, 1948 that owing to his default, the contract stood cancelled. The appellant's contention was that the cancellation of the contract by him was in the circumstances justified.

Defendant No. 2, the alleged prior mortgagee, who had been impleaded as defendant No. 2, pleaded that he had been unnecessarily joined to the suit and denied that he had made conflicting statements regarding the subsisting nature of the debt as alleged in the plant.

On these pleadings, the trial Judge framed 6 substantive issues. He rejected the appellant's contention that the second respondent was not competent to file the suit along with the first respondent, but he upheld his pleas on other points. According to the trial Court, the appellant had validly rescinded the contract, the respondent No. 1 had committed breach of the contract and not the appellant, and respondent No. 1 was not ready and willing to perform his part of the contract. He also held that the second defendant was not a necessary party to the suit. On these findings, the claim made by the respondents was rejected and their suit was dismissed with costs.

Respondents 1 and 2 then preferred an appeal in the High Court of Andhra Pradesh. Subba Rao, C.J. and Umamaheswaram, J., who heard the appeal in the first instance, differed. Subba Rao, C.J. held that respondent No. 1 was ready and willing to perform his part of the contract at all material times and that the appellant was not justified in rescinding the contract. As we will presently mention, before the contract was rescinded, respondent No. 1 had called upon the appellant to satisfy him about his clear title by producing before him evidence that the prior mortgage over the property covered by the agreement had been satisfied. The trial Court had held that this requisition was not *bona fide* and had, in fact, been set up by respondent No. 1 to gain time, because he did not have enough money with him to pay the balance to the appellant. Subba Rao, C.J., differed from this conclusion and held that the requisition made by respondent No. 1 in that behalf was justified and had not been waived as alleged by the appellant.

Umamaheswaram, J., on the other hand, agreed with all the findings recorded by the learned trial Judge. He held that respondent No. 1 was not ready and willing to perform his part of the contract at all material times, that the demand made by him for proof of the discharge of the alleged prior mortgage was not *bona fide* and it was not justified, and according to him, the appellant had validly rescinded the contract.

In view of this difference of opinion between the two learned Judges, the appeal was referred to Chandra Reddy, J., who agreed with the view taken by Subba Rao, C.J. and so, in the result, the appeal was allowed and the claim made by respondents 1 and 2 was decreed with costs throughout. It is against this decree that the appellant has come to this Court by Special Leave.

Before dealing with the merits of the appeal, it is necessary to refer to some more facts in regard to the property with which we are concerned in the present appeal. The said property consists of agricultural land and its area is about 6 acres. It formed part of a larger area of 40 acres which originally belonged to one Upadrasta Venkatarama Sastri and his brother's widow Venkata Lakshamma. It appears that on 26th March, 1928, the said two owners had created a simple mortgage in respect of this property for Rs. 10,000 in favour of the second defendant. On 12th April, 1931, one of the two mortgagors Venkatarama Sastri executed another simple mortgage for Rs. 2,000 in favour of the same mortgagee the mortgaged properties being the same as under the first mortgage plus some more lands. During the subsistence of these mortgages the mortgagors sold the equity of redemption in the said lands bit by bit until about 11 acres remained with them.

The appellant had obtained a money decree against the Upadrasta family in O.S. No. 213 of 1930 in the Court of the District Munsiff at Bapatla. In execution of the said decree, the said lands were brought to sale and they were purchased at Court auction by one Raghavayya. The sale certificate was issued in favour of the Court purchaser on 7th December, 1942. On 29th October, 1945, the said Court purchaser sold the said property to the appellant. Having obtained title to the said property in this manner, the appellant entered into the suit agreement of sale with respondent No. 1 on 4th December, 1947.

As soon as this agreement was entered into between the parties, the first respondent was put in possession by the appellant. The agreement was that the balance had to be paid by respondent No. 1 to the appellant within one month and that if it was not paid within the said time, it was to carry interest at $6\frac{1}{2}$ per cent. per annum. It is common ground that soon after the property was thus put in possession of respondent No. 1, he received nearly Rs. 1,200 as income from the crops standing in the field which had been delivered to him. The result of this agreement was that respondent No. 1 on payment of Rs. 1,500 only got possession of the land, and promised to pay the balance within the stipulated time, subject to the condition that on failure to pay the amount, he would pay interest at $6\frac{1}{2}$ per cent. per annum on that amount.

After this agreement was passed, respondent No. 1 paid Rs. 3,000 to the appellant on two dates which we have already mentioned. Since he did not pay the balance of the price, the appellant sent a telegraphic notice to him calling upon him to pay the balance within four days. This notice was served on 1st October, 1948. The first respondent did not acknowledge receipt of this telegram, but proceeded to ask the appellant to show him the documents of title as well as vouchers to satisfy him that the prior mortgage over the property had been discharged; and he alleged that the appellant was deliberately avoiding to produce those documents and was gaining time. This notice was replied by the appellant on 22nd October, 1948. The appellant warned the first respondent that the demand for the documents was a device intended to gain time and that the first respondent knew all about the prior mortgage and was not justified in asking the appellant to produce any documents in that behalf. Thereafter on 16th November, 1948 the appellant by notice informed the first respondent that the agreement had been cancelled and called upon him to deliver possession of the property and take back the amount of Rs. 4,500 which had been paid by him to the appellant less the amount due to the appellant towards the yield from out of the said lands. Further exchange of notices took place between the parties and ultimately on 22nd April, 1949, the present suit was filed.

We have already seen that two substantial issues arose between the parties in the present litigation. The first issue was whether the appellant was justified in rescinding the contract and the decision of that issue would turn upon the consideration of two other points, whether the time was of the essence of the contract as it was initially made between the parties; if not, whether the appellant was justified in making time the essence of the contract by his notice which he issued on 1st October, 1948. The other aspect of the matter which would be relevant in dealing with the question about the validity of the rescission of the contract by the appellant, is

whether respondent No. 1 was justified in calling upon the plaintiff to produce satisfactory proof about the discharge of the prior mortgage. The other important issue which arose between the parties was whether respondent No. 1 was ready and willing at all material times to perform his part of the contract. Since we have come to the conclusion that the trial Court was right in holding that respondent No. 1 has not shown that he was ready and willing to perform his part of the contract, we do not think it necessary to consider the other issue as to the validity of the rescission of the contract. There is no doubt that in a suit for specific performance, the plaintiff must show that he was ready and willing to perform his part of the contract from the time that the contract was made until the date of the decree. This position is not disputed before us, and so, we will deal with this point in the present appeal.

The true legal position in this matter is not in doubt. In a suit for specific performance, the plaintiff must aver in his plaint that he was ready and willing to perform his part of the contract and if the said averment is traversed, he must prove the said averment. Law does not require that in order to prove his readiness and willingness, the plaintiff must show that he had ready in his hands the requisite amount which had to be paid by him to his vendor. If he proves that he had in his hands such ready amount at all material times and was willing to pay it and get the conveyance executed in his favour that, of course is a very clear case of the plaintiff's readiness and willingness. But the same fact can be proved if the plaintiff can show that at all material times he could have raised the said amount and was willing to do so and was prepared to perform his part of the contract and carry out the stipulations binding on him. If the plaintiff fails to allege and prove his readiness and willingness in this matter, he has no right to claim specific performance.

In the present case, the plaintiff did not specifically aver in general terms the readiness and willingness of respondent No. 1 to perform his part of the contract. The only material allegation made in the plaint was that

"the first plaintiff kept the balance of the sale-price all along ready and as the first defendant appeared to throw doubts even on this fact the first plaintiff deposited the balance of Consideration money together with interest at the contract rate of Rs. 0-4 per Rs. 100 per month up to that date viz. Rs. 7,290-7-6 in the name of his lawyer Shri Burra Ramamurti on 24th November, 1948, in the District Co-operative Bank Tenali and intimated the fact of deposit in the registered notice of that date."

It is true that the issue which was framed in this behalf was a general issue about the readiness and willingness of the first respondent to perform his part of the contract, but the allegation made in the plaint was more precise, concrete and narrow, it was that the first respondent had kept ready with him the whole of the balance due to be paid to the appellant. It is significant that when respondent No. 1 gave evidence he sought to support this narrow, specific and clear case. He stated on oath that he had money ready and he had told the appellant that the money was ready with him and that he would pay it to him immediately if only the appellant was willing to execute the document. According to his evidence, by the first week of March, he had kept the balance ready with him. It is thus clear that the parties went to trial on this issue by reference to the narrow case made by respondent No. 1 that he had the balance ready with him from March, 1948. The trial Court examined the whole of the evidence, oral and documentary, led by respondent No. 1 in support of his plea and came to the conclusion that he did not have the necessary money till 23rd November, 1948 to perform his part of the contract, and so, in order to cover up his inability to produce that amount, he made unreasonable demands on the appellant by calling upon him to produce satisfactory evidence about the discharge of the prior mortgage. It may be stated at this stage that though the respondents impleaded defendant No. 2 on a specific plea that defendant No. 2 was making contrary claims on the strength of the prior mortgage, at the trial they gave up that plea and offered to have the sale deed without any proof about the satisfaction of the said earlier mortgage.

When the appeal was argued before the High Court, it does not appear to have been urged by the respondents that the finding of the trial Court on the narrow

point raised before it was wrong. In fact, though there was a difference of opinion between Subba Rao, C.J. and Umamaheswaram, J., on other points raised in the appeal, all the three learned Judges who heard the appeal in the High Court have not differed from the finding of the trial Court that respondent No. 1 had failed to prove his plea that he had the balance ready with him since March, 1948. The difference arose on the question as to whether it was essential that respondent No. 1 must prove that he had the cash with him, or whether it would be enough if he showed that he could have raised the necessary amount at all material times. On this point, Umamaheswaram, J., held agreeing with the trial Court that since respondent No. 1 had made a clear, categorical and specific case in that behalf, it was not open to him to give up that case and to contend in the alternative that even if he had not the cash ready with him, he could have easily raised the said amount. Umamaheswaram, J., thought that if such a new plea was allowed to be raised in the appeal for the first time, it would be unfair to the appellant, whereas Subba Rao, C.J., took the view that the approach adopted by the trial Court was wrong and that, in law it was open to respondent No. 1 to prove that he could have raised the said amount at the relevant time. In our opinion, the view taken by Umamaheswaram, J., is right. Subba Rao, C.J., appears to have ignored the specific plea made by the respondents in their plaint. He has not noticed the fact that the plaint did not make any averment as it should have about the respondent's readiness and willingness to perform their part of the contract, and the only allegation made in that behalf was that respondent No. 1 had the necessary cash at all material times. That being so, it would not be right, we think, with respect, to hold that the trial Court was bound to enquire whether respondent No. 1 could have raised the said amount. It was open to respondent No. 1 to make that plea and then the trial Court could certainly have considered it. But if the first respondent made out a much higher claim and suggested that he would prove that he had the necessary amount in his possession it would not be right to find fault with the trial Court if it considered that plea in the light of the evidence adduced by the respondent in its support and on the merits, rejected it. The finding of the trial Judge on the merits is unexceptionable and has not been dissented from in the High Court. The only question which calls for our decision, therefore, is whether the Appeal Court should have allowed the respondents to make out a new plea of fact for the first time in appeal. In dealing with this question, we must have regard to the pleadings made by the parties on the point, and as we have already indicated, the pleas made by the respondents and the evidence led on their behalf unmistakably indicate that their case was that cash was ready in the hands of respondent No. 1 and respondent No. 1 was willing to pay it to the appellant at all material times.

Besides, there are some general considerations which are inconsistent with the view taken by the majority of the Judges in the High Court. If respondent No. 1 had the necessary amount ready in his possession, it is very unlikely that he would keep it with himself and not pay it to the appellant, because a fairly large amount lying idle with him carried no interest, whereas non-payment of the said amount to the appellant involved the liability of respondent No. 1 to pay interest. That is one consideration which is inconsistent with the case of the respondents.

The other consideration which has not been duly taken into account by the High Court is the conduct of respondent No. 1 in depositing the amount on 24th November, 1948, with his lawyer. This deposit was made after respondent No. 1 received Rs. 6,900 from respondent No. 2 on 22nd November, 1948. It is not without significance that respondent No. 1 who claims to have had the balance ready with him during the whole of the period, has had to agree to sell the property to respondent No. 2 even before a conveyance was executed in his favour and as the trial Court has observed, and rightly, there is every reason to believe that it is out of the amount of Rs. 6,900 paid by respondent No. 2 to respondent No. 1 that the deposit came to be made on 24th November, 1948.

In this connection, the demand made by respondent No. 1 on the appellant to produce evidence about the discharge of the prior mortgage also throws some light. The respondents solemnly impleaded defendant No. 2 in the present suit on the plea

that defendant No 2 was setting up a claim in respect of the property in question and when defendant No 2 denied that he made any conflicting statements, they told the trial Court that they did not press that part of their case. It is unnecessary to consider the evidence led by the parties on this part of the case, but we cannot help observing that the trial Court appears, on the whole to be right in coming to the conclusion that respondent No 1 invented this requisition in order to gain time, otherwise it is not easy to understand how without satisfying himself that the prior mortgage had been discharged, he agreed to convey a good title to respondent No 2 and how at the trial, both the respondents agreed to take a document from the appellant without adjudication about the said alleged claims of the prior mortgagee. Those general considerations in our opinion, lend strong support to the view taken by the trial Court that respondent No 1 did not possess the necessary cash, and so, could not succeed in the present suit for specific performance. If respondent No 2 had pleaded at the trial that he would have been able to raise the necessary amount, the appellant would have had an opportunity to meet that case, but since no such plea was made at the trial it was not open to him to raise this point for the first time in appeal. Therefore, we are satisfied that the High Court erred in entertaining this plea and allowing the respondents claim for specific performance on the ground that the said plea had been established.

The result is the appeal is allowed, the decree passed by the High Court reversed and that of the trial Court restored with costs throughout.

V K

Appeal allowed

THE SUPREME COURT OF INDIA

(Civil Appellate Jurisdiction)

PRESENT —M HIDAYATULLAH, J R MUDHOLKAR, R S BACHIAWAT AND J M SHELAT, JJ

T D Gopalan

Appellant

v

The Commissioner for Hindu Religious and Charitable Endowments, Madras

Respondent

Constitution of India (1950) Article 133 (1) (a) and (b)—Dispute as to whether suit property was private alienable property or a public temple—If incapable of valuation for the purposes of Article 133 (1) (a) or (b)

Where the dispute between the parties to a suit centres round the question whether the suit property is private alienable property of a certain family or is a public temple it cannot be said that the subject-matter of the dispute is incapable of valuation for the purpose of grant of a certificate under Article 133 (1) (a) or (b). The subject-matter of the dispute has to be ascertained with reference to the claim made by the plaintiff in the plaint and where according to the plaint the property is the private alienable property of a family the Court ought to value the property accordingly for the purposes of Article 133 (1) (a) or (b) though according to the defendant the property is inalienable and is a public temple which could have no market value.

Appeal by Special Leave from the Judgment and Order dated the 11th January, 1961 of the Madras High Court in S G Petition No 165 of 1960

R Ganapathy Iyer and R Thiragarajan, Advocates, for Appellant

A V Rangam, Advocate, for Respondent

The Judgment of the Court was delivered by

Shelat, J —This appeal by Special Leave is against the order of the High Court of Madras dated 11th January, 1961 refusing the certificate under Article 133 (1) (a) and (b) of the Constitution.

The authorities appointed under the Hindu Religious and Charitable Endowments Act, (Madras Act II of 1927) having held that the premises No 29, South Masil Street, Madurai, wherein the idol of Sri Srinivasaperumal and certain other

idols were located constituted a temple within the meaning of the said Act, the appellant filed an application in the District Court for a declaration that the said premises were private property and for an order setting aside the said decision. The said application was by an order of the High Court converted into a suit. The main question in the suit was whether the said premises could be said to be a temple as defined by Madras Act XIX of 1951. The District Judge, Madurai, decreed the suit in favour of the appellant holding that the aforesaid premises did not constitute a temple and set aside the decision of the said authorities. On appeal, the High Court reversed the said judgment and decree and found that the premises in question constituted a temple. The appellant thereupon filed a petition for leave to appeal to this Court and submitted that the value of the subject-matter of dispute in the District Court as also in appeal in the High Court was more than Rs. 20,000 and that the judgment of the High Court having reversed the judgment and decree of the trial Court he was entitled to leave under Article 133 (1) (a) and (b). The High Court dismissed that application on the following grounds: (a) that the subject-matter of the dispute, whether it was a private or a public temple could have no market value and therefore was incapable of valuation; (b) that clause (b) of Article 133 (1) could not apply as the judgment and decree passed by it did not involve directly or indirectly a claim or question respecting property of the value of Rs. 20,000 or more; and (c) that the appeal did not involve any substantial question of law.

For the time being we are concerned with grounds (a) and (b) and not with ground (c) as the contention raised by Mr. Ganapathi Iyer for the appellant was that the refusal to grant leave by the High Court under either of the clauses (a) and (b) of Article 133 (1) was not correct.

The point for consideration is whether the High Court was right in holding that the property in question whether as a private or a public temple was incapable of valuation as it could have in either case no market value. It may be observed that the appellant claimed that the property belonged to the Thoguluva family and he was in management thereof for and on behalf of the family. The suit in the first instance was filed by him in the form of an application, being O.P. No. 37 of 1950 under section 84 (2) of Madras Act II of 1927. Under that Act only a fixed Court-fee was payable. That being so, the appellant did not have to pay Court-fees as it would in the case of an ordinary suit on a valuation made by him therefor. The application was subsequently converted into a suit by an order of the High Court. He was therefore entitled to contend at the time of the leave application that the property in dispute was of the value of not less than Rs. 20,000.

It does not appear to be in dispute that the site of the Mandapam and the structure standing thereon was originally the property of one Kuppaiyan and his undivided sons. The appellant's case was that in execution of the decree in suit No. 650 of 1882 passed against the said Kuppaiyan the property was sold by public auction and purchased by Thoguluva Thirumalayyan, the appellant's ancestor, for a sum of Rs. 1,060. The original mandapam was thereafter improved upon and some additional structures e.g., shops and other constructions were added, the expenses for such repairs and additions having been met by the descendants of the said Thoguluva Thirumalayyan, and therefore the property belonged to and was an alienable private property of the family. On the other hand, the case of the respondents in their written statement was that the property was a public temple for public religious worship and that the allegation of the plaintiff that it was a private property capable of alienation was "false and misleading". The case of the appellant was accepted the trial Court but was rejected by the High Court and the High Court held that the property was a public temple within the meaning of Madras Act XIX of 1951.

The dispute between the parties was thus centered round the question whether the property was the private alienable property of the said family or was a public temple as held by the High Court. There was evidence that the shops subsequently

constructed as aforesaid were let out to tenants for a number of years and property taxes were levied thereon by the Madurai Municipality, presumably on their rateable value. We may also mention here that on his application to this Court for directing an inquiry into the value of the property under Order 45 Rule 1 of the Code of Civil Procedure the appellant has stated that he has in his possession municipal receipts showing the property tax paid to the Madurai Municipality. According to the appellant, property tax for the half year ending 30th September, 1950 was Rs 94 0 6 and for the half year ending 31st March, 1961 it was Rs 130 36 nP. According to him the half yearly tax would be equivalent to one month's rent and on that basis the annual rental value would come to Rs 1,126 6 0 in 1,950 and to Rs 1,672 32 nP in 1961. If that be so, capitalising that value at twenty times the annual rental value, the value of the property would come to more than Rs 20,000.

The refusal of the High Court to grant leave was based on the observation that whether the property is a private or a public temple it was incapable of valuation. But as observed earlier the appellant's case was that the subject matter of dispute in the suit was the private property of the said family and that it was alienable property and therefore capable of a valid transfer. That being the dispute between the parties, the High Court was not right in assuming that whether the property was a private or a public temple, it was incapable of valuation. The subject matter of the dispute has to be ascertained with reference to the claim made by the plaintiff in his plaint and since according to the plaint, the property is the private property of the said family capable of alienation, the High Court ought to have valued the property accordingly and though according to the respondents the property was inalienable and was a public temple. The High Court was thus wrong in proceeding on the aforesaid assumption.

We would therefore allow the appeal, set aside the order passed by the High Court and remand the case to the High Court to decide the application for leave in accordance with the observations made in this judgment. The High Court may either hold the inquiry itself or remit the case to the trial Court to hold such inquiry and report to it. Accordingly, the appeal is allowed and the High Court's order is set aside. The respondents will pay to the appellant the costs of this appeal.

V K

Appeal allowed

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